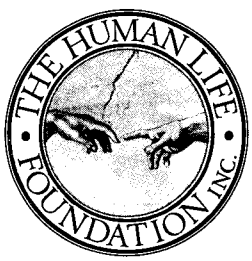
the HUMAN LIFE REVIEW



WINTER 1982

Featured in this issue:

Malcolm Muggeridge on ..... The Side of Life
Joseph Sobran on ..... Crucial Issue Politics
Prof. John F. Matthews on .....An Addendum
Ellen Wilson on..... Self-Made Men
Francis Canavan on..... A Justice Amendment
William Eaton, Esq., on ..... Lawless Judges
John T. Noonan, Jr. on ..... Raw Judicial Power

Also in this issue:

James Burnham • Robert H. Bork • Frank Zepezauer
Allan C. Carlson • J. Robert Nelson

Published by:

The Human Life Foundation, Inc.
New York, N.Y.

Vol. VIII, No. 1 $3.00 a copy

. . . FROM THE PUBLISHER

We begin our eighth year of publication. It would seem that we have accomplished a great deal during the past seven years; certainly our Review has grown steadily in size and scope, and (we'd say) is now generally considered to be the principal "publication of record" in the continuing debate on abortion and the other issues related to it. None of this would have been possible without the support and encouragement of our readership which, we are glad to report, also continues to grow.

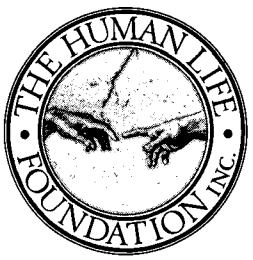
So do our publishing efforts. We have now established *The Human Life Press*, which we hope and expect will become an important part of our expanding educational effort. The first book with the HLP imprint is *An Even Dozen*, by Ellen Wilson, our contributing editor. It is a collection of her essays (all of which first appeared in this Review), and is now available (at $10 per copy) directly from the Human Life Foundation (see inside back cover for details).

In our last issue, due to a printing oversight, the publisher's statement was omitted. Thus we did not give proper credit for Professor John T. Noonan's article, "The Experience of Pain by the Unborn," which is also a chapter in the book *New Perspectives on Human Abortion*, recently published by Aletheia Books (University Publications of America, Inc., 44 North Market Street, Frederick, Maryland 21701; paperbound, $9). We think many of our readers may be interested in the book, which is a large and varied collection of articles on the whole abortion controversy, edited by Thomas W. Hilgers, M.D., Dennis J. Horan, Esq., and David Mall, Esq., all well-known authorities on the issues involved. Copies may be ordered direct from the publisher.

All previous issues (and bound volumes of the years 1975-80) remain available; see inside back cover for details. We also have available, in booklet form, the now-famous Stephen Galebach article, "A Human Life Statute," at $1.00 per copy. Finally, *The Human Life Review* is available in microform from both University Microfilm International (300 N. Zeeb Road, Ann Arbor, Michigan 48106) and Bell & Howell (Micro-Photo Division, Old Mansfield Road, Wooster, Ohio 44691).

EDWARD A. CAPANO
Publisher

THE HUMAN LIFE REVIEW



WINTER 1982

Introduction 2
On the Side of Life ..... *Malcolm Muggeridge* 6
Crucial Issue Politics ..... *Joseph Sobran* 9
An Addendum to Abortion ..... *John Floyd Matthews* 19
Self-Made Men ..... *Ellen Wilson* 33
The Justice Amendment ..... *Francis Canavan* 43
In Pursuit of Lawless Judges ..... *William Eaton* 46
Raw Judicial Power ..... *John T. Noonan Jr.* 71
Appendices 82

Published by THE HUMAN LIFE FOUNDATION, INC. Editorial Office, Room 540, 150 East 35th St., New York, N.Y. 10016. The editors will consider all manuscripts submitted, but assume no responsibility for unsolicited material. All editorial and subscription inquiries (and all requests for reprints and permission) should be sent directly to the editorial office. Subscription price: $12 per year; single copy, $3. Bulk prices on request.

Vol. VIII. No. 1 ©1982 by THE HUMAN LIFE REVIEW, INC. Printed in the U.S.A.

INTRODUCTION

WHAT BETTER WAY TO begin an issue — any issue — than with something from Malcolm Muggeridge? We are especially happy to do so here; this number (our 29th) celebrates our Seventh Anniversary (the *lean* years we trust) and begins our eighth year of publication. This journal would not have been conceived and born but for the abortion issue; Mr. Muggeridge warns us that events have moved so swiftly that we must now expect a powerful effort for the "acceptance of euthanasia as part of our contemporary way of life."

Of course no regular reader of this journal will find that surprising; not only have the warnings mounted steadily, but also the very fact of legalized abortion (now "normal" virtually throughout the western world) was bound to lead to the destruction of that "sanctity of life" ethic which, for two millennia at least (and at least in what was once called "Christendom"), protected defenseless human life. If new life can be snuffed out at will, why not old? Or any life not up to the mark of the new standard, which is not the sanctity but the "quality" of life? Yet will not the Qualifiers face greater difficulties with euthanasia? The unwanted unborn cannot speak for themselves; the unwanted born often can, and will predictably say "No" to death if they are allowed to speak. Thus the solution must be to arrange for others to speak for them. Many today proclaim their willingness to speak for others in this matter of life or death; in due course, however, new speakers will speak for the old speakers, the judges will be judged. The ancient choice is unchanged: we must choose life, or death. "Choose life," the Scripture tells us, and Mr. Muggeridge — admitting that "the tide is flowing fast and furiously" *against* that choice now, remains confident that "its ultimate triumph is certain."

In coming issues we expect to run a great deal more about this "new" threat of legalized euthanasia. For the moment, however, we again concern ourselves primarily with its progenitor, abortion. Mr. Joseph Sobran addresses, in his usual high style, the notion that those who

choose life as the highest of values are therefore narrow-minded, not to mention callously indifferent to the "hard cases" in which some lives are not worth living. Of course these lives belong to somebody *else*, but they have been very useful to pro-abortionists in justifying a practice which — however many "hard" lives it prevents — snuffs out millions of perfectly normal ones in the process. Mr. Sobran thinks that it is precisely this "sense of outraged normality" that fuels the "single-issue" politics of anti-abortionists; they feel that something is intolerably wrong with a society that permits mass slaughter, and they mean to begin "reform" at the obvious point. But then we should know by now not to attempt to explain anything Sobran says — you will surely read it yourself.

Another article we think you will not fail to read is Professor John Matthew's proposal for carrying the logic of abortion (and the "reasons" that justify it) a little farther than, up to now, its proponents have been willing to go. When we first read it, we wondered why nobody else had said it all before. You may well wonder the same thing. Perhaps it has to do with the problems we noted above: as our "obvious" choices multiply, it becomes progressively harder to choose only for *others*.

At this point we think you will welcome a change of pace, and nobody can provide one better than Miss Ellen Wilson, whose cool prose and inexorable sanity seem to improve with every essay. As so often, she begins with ideas most of us take for granted, then moves skillfully on to show some implications we hadn't thought of, and ends by demonstrating persuasively that we ought to have expected some unexpected results. As it happens, one of them concerns what our judges have been judging in recent decades. We now see law, she says, not as a codification of principles, but rather as a means of handling "situations." Abortion was, until just a few years ago, not only illegal but morally unthinkable. Now that it has become "thinkable," the question becomes: How do you *handle* it? Not, anymore, with a Solomon-like decision, but with a decision that reads like something from the Federal Register — in short, with "regulations" such as those the Supreme Court handed down in the *Abortion Cases*.

Then, along comes our old friend Francis Canavan, S.J., with a "proposal" that pins the problem like some butterfly to the page. In the name of Liberty and Equality, have we made our judges not interpreters *of*, but tinkerers *with*, our laws? If so then, as Father Canavan sees it, the only constitutional remedy lies within the Congress, which alone has the explicit power to regulate what the courts do.

As you will see, all this serves nicely as a kind of warm-up for William Eaton, Esq., who comes to argue the case for some very bold congressional action indeed. More, Mr. Eaton says that the idea was originally proposed by Chief Justice John Marshall himself — a little known his-

torical fact that will undoubtedly amaze those (especially other lawyers) who were unaware that the Abraham of today's tribe of judicial supremacists committed this Original Heresy (evidently Marshall's chief biographer himself found it all but unbelievable, but there it was, in Marshall's own hand).

It is an understatement to say that our final article is also about abortion; it is in fact a kind of classic on the issue. Probably no legal scholar in America has written more *in re* abortion than our colleague, Professor John T. Noonan, whose *A Private Choice* remains the definitive study to date (it was first published in 1979). Certainly no other expert has written with Noonan's passionate concern — a fact to which our long-time readers can attest (he has been one of our most frequent contributors). Well, this article is the *first* he wrote, almost immediately after the Supreme Court legalized abortion-on-demand nine years ago. Then, some argued that the Court had *not* gone that far. But as you will see, Professor Noonan saw clearly not only what the Justices had actually done, but also what it would *mean*: e.g., he highlights the most-pregnant "meaningful life" standard proclaimed in *Wade*, and asks the obvious: "Who shall make the judgment that life has meaning . . .?" Which question brings us right back to where Malcolm Muggeridge started us off. The question remains, not merely nine years later, but as it was in the beginning, and will remain, *in saecula saeculorum.*

* * * * *

As usual, we have added appendices which we think will be of interest, and that complement much of what you have in the articles. For example, Appendix A is a brief treatment of the *actual* position of the Supreme Court in the American system of co-equal branches — or what that position *would* be if the other branches exercised their own powers. We were tempted to run it as a feature article, for it is the finest summary of the case we've ever seen. Small wonder: its author is Mr. James Burnham, one of the great seminal thinkers of our time, best known here (and abroad) for books such as *The Managerial Revolution*, and also as a founding senior editor of *National Review*. (To those privileged few who, like your servant, have worked with him, Burnham is simply The Mentor.)

Appendix B also concerns the Court; it is an excerpt from a book review by Mr. Robert Bork, once U.S. Solicitor General, and a recognized constitutional scholar; here, we should note that Mr. Bork is himself pro-abortion — and suggest that you read what he has to say only after you have read Burnham (not to mention Canavan and Eaton).

Appendix C relates to just about everything we have printed herein: it

is the full text of the now-famous 1970 *California Medicine* editorial; it has already been reprinted twice previously in this journal, but it seems to us even more relevant today than when first published. Appendix D, in turn, illuminates the landmark character of that editorial: it is the full text of what the American Medical Association had to say about "Criminal Abortion" just over a hundred years previously.

Appendix E is another excerpt from a current article that illustrates with painful clarity just what the change in our "medical ethics" means in *practice* (i.e., from a "moment of decision," living beings become human, or non-human, according to the "choice" made by another). Do such horrible choices worry anybody nowadays? Well, yes. Appendix F shows that even a most secular and worldly journal worries over some of the choices now available. And Appendix G may illustrate another change: when we began publishing in 1974, it seemed unimaginable that abortion would become an issue of importance to "the business community" — yet here we have an example that it is becoming just that, and for good reason. Finally, Appendix H is simply a remarkable document that, yet again, brings us back to our beginning: selective death is now a fact of life. But the survivors can still put on a good show, and command quite an audience (surely we can see Muggeridge there, grinning approval?). We have never provided you simple fare, dear reader, but we admit that we've never before demanded such attention as we think this issue deserves. We hope to do better next time.

J. P. McFADDEN
Editor

On the Side of Life

Malcolm Muggeridge

THE GREAT PUBLIC EXCITEMENT over the acquittal of Dr. Leonard Arthur at Leicester Crown Court of the attempted murder of a Downs Syndrome, or mongol baby, carried my mind back to 1938. For it was in that year that Dr. Aleck Bourne, a senior obstetrician, decided that it was his duty to perform an abortion on a 14-year-old girl who had been raped by several guardsmen. He duly carried out the operation, was tried, and like Dr. Arthur, acquitted, to the accompaniment of considerable acclaim.

Few, if any, of those who applauded him will have envisaged his acquittal making straight the way to abortion on demand some years later. This, however, was what happened, and Dr. Bourne, observing it happen, came to regret his action; became, indeed, in due course, an ardent anti-abortionist.

How easily a compassionate impulse can thus be translated into a holocaust is well illustrated by the manner in which the acceptance in the Weimar Republic of euthanasia as enlightened and estimable, provided the initial justification in Hitler's Third Reich for the genocide programme of 1941-45. "Technical experience gained first with killing psychiatric patients," Fredrick Wertham, writes in his deeply disturbing book, *A Sign for Cain*, "was utilised later for the destruction of millions. The psychiatric murders came first." While pictures of the Nazi holocaust were horrifying television and cinema audiences throughout the western world, all unbeknownst to them another ostensibly humane holocaust was being mounted, no less terrible than the other, for being aimed at enhancing the quality of life.

It requires no great prophetic power to foresee that the trial and acquittal of Dr. Arthur may likewise be expected to prepare the way for acceptance of euthanasia as part of our contemporary way of life. At first, it will be a matter of disposing of seriously handi-

---

Malcolm Muggeridge needs no introduction to readers, anywhere. This article first appeared in the London *Sunday Times* of November 8, 1981, and is reprinted here with permission ().

capped children who, for whatever reason, may be plausibly regarded as unlikely to appreciate the full quality of life available today — that is to say, to travel, drive a motorcar, have sex, watch television, and otherwise relish the devices and desires on offer in the twentieth century.

We may assume, then, that soon there would be no more mongol children needing special care at home or institutions. Materialistically considered, this would be a solid gain; the quality of human livestock will be to that extent improved.

Some mothers, it is true, have found a special joy in caring for their mongol children. I am thinking, for instance, of Mary Craig who, in her splendidly honest book *Blessings*, describes how spiritually rewarding had been looking after her appallingly disturbed and distorted second child, Paul. "The fear of Paul's being dragged off to an institution was the blackest one of all, however agonising it might be to look after him, I could not face the prospect of letting him go."

Then there is Fr. Bidone, a priest of rare quality who looks after several institutions for mongol children. Occasionally, I have visited him, and always come away feeling happy and uplifted. Once he brought some of his boys to see me off at Heathrow Airport. At first, to my shame, I was a little embarrassed and then, looking around, I noticed that everyone, staff and passengers alike, was smiling. It seems as though God has put in these boys some special lovingness and joy in life to compensate for their deformity.

Nevertheless, in terms of the quality of life there would seem to be little reason for keeping such boys alive. If they are disposed of before or just after birth, those responsible for looking after them would be relieved of what can be a burdensome duty, and the boys themselves, of an existence that, in worldly terms, could never be other than unsatisfactory.

The same reasoning applies to the infirm and senile old. Caring for them is expensive and exhausting; they themselves, as one sees them in old people's homes sitting around with nothing to do, would seem to be just waiting to die.

In terms, however, of the sanctity of life the situation is quite different. Sanctity of life is a religious or transcendental concept, not a materialistic one, and presupposes the existence of a God,

and a destiny for his creation reaching beyond the confines of time and mortality. All of us, the most learned, the ablest, the most charismatic, are equally infinitesimal in relation to our creator, and, seen across eternity, can scarcely be distinguished one from another.

How, then, can any decision be made that such a person should not be allowed to be born, and such another person not be allowed to go on living? That a mongol child has no right to be born or to live? Or that some mumbling old gaffer would be better dead? If life is sacred, it can only be wholly so; it cannot be sacred in parts; just as, if life is worth living at all, it can only be in all conceivable and inconceivable circumstances. Its sacredness extends to every aspect of our existence, to whoever and whatever participates in the amazing creativity responsible for a measureless universe and a grain of sand, for elephants and fleas, for joy and woe.

It would seem to be a choice between these two — the sanctity of life or the quality of life. Which side are we on? On the one hand, keeping down our numbers so that we get ever more affluent — 2.5 kids at the most, controlling the new arrivals to ensure that they are top grade in mind and body, and the departures to ensure that they are eased out of this world as they begin to show signs of decreptitude. On the other hand, the sanctity of life, with mankind as a family whose father is God in whose image they are made; not equal but brothers, our family the microcosm of our creator's macrocosm. It would seem that the tide is flowing fast and furiously towards the former of these alternatives; I am for the latter, and confident that its ultimate triumph is certain.

Crucial Issue Politics

Joseph Sobran

ABORTION MIGHT BE CALLED the single issue about which you mustn't be a single-issue voter. Civil rights, Israel, farm policy, nuclear energy, entitlement programs, whales — you can be downright obsessive about any of these, and nobody will say boo.

Come to think of it, any political lobby is likely to be a single-issue affair. Even the hated oil lobby isn't criticized for not branching out into snail darters or something. Why is the charge of single-issue politics — well, a charge?

We should probably refuse to take the charge at face value. The pro-abortion side hasn't been what I would call ingenuous. They specialize in footage of babies with *spina bifida* and other terrible birth defects, when in fact most women or couples who decide to abort don't wait around to find out whether the blessed non-event would have brought deformity into the family: they just want to get rid of the thing. As everyone knows, really.

Last fall Mike Wallace did a *Sixty Minutes* segment on Congressman Henry Hyde, author of the Hyde Amendment, in which Hyde's own eloquent arguments for the rights of the unborn were spliced with shocking cuts to deformed babies, raped 12-year-olds, and other other-than-typical subjects. Wallace and his film editors were obviously trying to suggest that Hyde was somehow in favor of deformity — a transparent *non sequitur*, in that Hyde would protect all unborn children, deformed or not, and in any case killing people is an odd way to spare them physical handicaps.

Pro-abortion polemics center around the hard cases so much that you begin to wonder if there are any easy cases. Apparently not. The pro-abortion side can't let go of those hard cases. After all, the movement for legalization began with hard cases, rape and incest being the staples of any diet of pro-abortion rhetoric. Of course there may be easy cases in real life, but film editors — the

---

Joseph Sobran, a prolific writer, is a contributing editor to this journal. This article was first published by The National Committee of Catholic Laymen, Inc., and is reprinted here with permission

unacknowledged legislators of the McLuhan era — seem never to have heard of them.

Remember? Around 1970 all we heard about was rape and incest and "the tragic choice." In 1973 abortion had abruptly ceased being an evil which only legalization could hygienically contain; guided by the Supreme Court, we were instructed that abortion was a "religious issue" about which "nobody could say" whether it was right or wrong. By 1976 it was a "basic human and constitutional right" which a few unnamed religious fanatics — acting on sealed orders from Rome — were bent on snatching away from us. Jack Newfield, a commentator on CBS Radio's *Spectrum*, has even accused Jesse Helms, sponsor of the Human Life Bill, of trying to establish a "theocracy," presumably a restoration of the popish regime first imposed in 1789.

As nearly as I can make out, the present pro-abortion orthodoxy can be summed up in the formula: the more abortions, the better. Nobody should ever be saddled with an "unwanted child." Whoever is forbidden an abortion is a victim of "compulsory pregnancy," to use a phrase coined by the National Abortion Rights Action League. (By the same token, a man who is forbidden to do away with his wife's obnoxious mother is doomed, I suppose, to compulsory son-in-lawhood.)

It is vital to keep things straight. Opposing abortion is "single-issue politics." Favoring abortion isn't. NARAL people, who keep sending out form letters accusing their opponents of firebombing clinics, are manifestly well-rounded human beings — *fully* human, as they might say.

Adjustments in the vulgar idiom are indicated. Having an abortion is not "murder," of course: by now everyone knows it's only a matter of "terminating a pregnancy." Unborn infants are of course "fetuses," though after termination they become "products of pregnancy." But it's still acceptable to say "rape" and "incest" rather than "involuntary intercourse" and "excessive family intimacy." Nobody is "with child" any more; one is merely "pregnant," not "with" anything particularly. True, some women still say things like "the baby [*sic*] is kicking," but that merely shows that they are insufficiently open to new ideas. I even saw a book at a newsstand titled *Caring for Your Unborn Baby*, when the author obviously

meant *Caring for Your Fetal Matter.* But such gaffes are probably protected under the First Amendment.

Then too, there was Louise Brown, who caused such excitement that everyone forgot themselves — even *Time* and *Newsweek*! — and blurted out "test-tube baby." To be precise, we should have described her as a baby who had originated from a fertilized egg in a dish, where she — or rather it — had been "part of its mother's body," albeit on furlough. Oops — did I say "mother"? Well, you know what I meant. Just a figure of speech. Give me a few more months.

Many of us need a few more months, maybe years. It is still less than a decade since the Supreme Court imposed its view on — or rather, "expanded the constitutional right of privacy" to include terminating a pregnancy. Only the *anti*-abortion side would "impose its views" on everyone else. They, not the judiciary, are "divisive." When a majority of the Supreme Court contradicts the Western moral tradition and the laws of 50 states into the bargain, anything other than instant unanimity of assent indicates that a divisive spirit is abroad. And so, alas, it is.

Greatly to the annoyance of the pro-abortion side, there are still millions of women who say things like "the baby is kicking" when they mean that one part of their bodies is creating an involuntary disturbance within another part. We seem to have two classes of people speaking two different languages, one refined, one coarse — much as England had after the Norman Conquest. But then, as George Orwell pointed out, it takes some time for a new language to really take hold.

And it has become clear that *this* new language is going to need a long, long time. At first the pro-abortion side assumed that *Roe* vs. *Wade*, like *Brown* vs. *Board of Education*, would find a gradual, if sullen, acquiescence. What they overlooked was that racial segregation ran counter to the moral sentiments of most Americans. Even its defenders were defensive. With abortion, the shoe is on the other foot.

Abortion violates every decent human instinct — so much so that its indecency must be clothed in euphemism. Its champions try to enlist compassion with an endless parade of hard cases, and to invoke snobbery by sneering at their opponents. Beyond that, they

have tried to rule out, on procedural grounds, the very instincts that work against them: opposition to abortion, they say, is "religious," *ergo* inadmissible in the political process. NARAL and the American Civil Liberties Union even determined, through surveillance, that Henry Hyde is a practicing Catholic — which he might have admitted anyway — and triumphantly adduced this fact in a federal appeals court to prove the Hyde Amendment unconstitutional. (Judge John Dooling actually bought this argument, only to be overruled — narrowly — by the Supreme Court itself.)

An even curiouser argument was made by the President of Yale University, A. Bartlett Giamatti, in his widely publicized attack on the Moral Majority. Among many other charges, he accused the religious Right generally of "presuming to say when life begins, which God alone knows." He did not explain how the president of Yale alone knows which things God alone does and does not know, though it must be remembered that the president of Yale has access to the Yale Divinity School, and Ivy League theology is not to be confused with Ivy League football. In any case, analysis is unnecessary: the point is that the opposition to abortion is intellectually *infra dig*. We have it on the authority of the commissioner of the intellectual Big Leagues.

How can one know which things God alone knows? The position is curious in principle. It is one thing, after all, to say that you personally don't know whether God exists. But a more general agnosticism — holding that nobody else can know either — is already a highly dogmatic doctrine. It means that although there may actually be a Creator, He is so unknowable that He cannot even communicate his own existence to his own creatures — He can press his nose against the glass, so to speak, and yell and bang, but we can never hear Him. This is quite a specific thing to know about an unknowable Being. It is a bit like saying that we can't know whether King Arthur ever really lived, but that if he did he must have been deaf and dumb.

Giamatti's ignorance is not quite so arrogant as that, but he apparently meant to say that God has said nothing one way or the other about abortion and has given us nothing to go on either. Does this mean that neither the Bible nor the Church offers grounds for a position? Or does it mean that Giamatti rejects the

authority of both? If the latter, did he mean to imply to the incoming freshmen to whom his words were addressed that they should reject the Judaeo-Christian tradition? Or what? (Some commentators insist that Giamatti's words, being interpreted, mean, "I will soon announce my candidacy for the Senate.")

I understand a fury in the words, though not the words, and the fury is against anyone who insists that we must, as a political society, hold that abortion is *wrong*. Of course nobody would make abortion compulsory, just as Stephen Douglas never meant that every white man should be forced to own a slave. But, says Giamatti (speaking for many), it is immoral to *say* that abortion is immoral, even though one is free to think so.

What people mean when they call anti-abortion people "single-issue voters" is that you may disagree with them about the wrongness of abortion, but you must not disagree with them about its *importance*. You must not give it priority over other issues. You must not regard it as one of those issues that are crucial in determining what sort of society we are.

And that, of course, is the very position opponents of abortion generally take. They care about it intensely because they care about it at all. To subordinate it to other issues would be for them to adopt the premises of their adversaries; and this, in the nature of the case, is impossible.

Is their instinct right? There is some empirical evidence to support them. Some million and a half abortions are now performed in the United States every year. Many of these are late term abortions that cause horrible pain to the child. Surely one needn't agree that a human fetus is "fully human" at that point to agree that it isn't just nothing, a nothing whose pain has no moral significance.

Social scientists do a lot of talking about the "unanticipated consequences" of social policy; which is only right, since results usually differ from intentions in this world. In the Sixties we were assured that massive social programs would eliminate the "root causes" of crime better than penal severity. Today, after more than a decade of social spending on an enormous scale, the crime problem is worse than ever. Some analysts contend that the supposed solution has actually aggravated the problem, by creating a welfare culture of dependence that destroys the work ethic and undermines

the family.

There is good reason to think legal abortion has had similarly unanticipated consequences. We were assured that having fewer unwanted children would mean a reduction in child abuse. But, as the daily news reports attest, that problem is grimmer than ever. So are the problems of illegitimacy and venereal disease. Why?

One can only speculate. But it may be that, as welfare weakens the work ethic, abortion weakens the family ethos. If the right to abort resides solely in the mother, the father — more often the culprit in many abuse cases — may still find himself burdened with an unwanted child. (Though the mother's live-in lover is disproportionately prominent in reports of child murders.)

The intention of welfare entitlements is to supply only the "truly needy," as if they were somehow a sharply distinguishable class. The idea is that they will know who they are, and will step forward to collect benefits, while others (with a few exceptions, of course) will abstain from making false claims. Obviously it doesn't work that way. Welfare is less a temporary expedient for many people than an addictive way of life.

The intention of legal abortion, in a similar way, is to make abortion available to women who truly need it. But when there is no objective standard, anyone who wants one will decide she "needs" one. Probably no one has ever predicted that he or she would abuse his or her own child anyway.

The very idea of a "right" not to have unwanted children implies a priority of parental desires over children's right to live. Whatever the editorial rhetoric may suggest about abortion sparing the child miseries attendant upon unwantedness, the real motive for abortion is nearly always selfish. There is no automatic coincidence of interest between parent and child. Pro-abortion rhetoric sends out a message that can only be translated as the right of parents to resent their children. If a child has no simple right to live before birth, will an infantile parent really feel it has a right not to be abused afterward? Not if life itself is so cheap as that. The man or woman who feels he or she has regrettably waived the right to abort is not necessarily likely to regard the small child as a sacred trust.

The rhetoric of abortion is all about assuming responsibility.

The reality of abortion is the evasion of responsibility. *Spina bifida*, poverty, hydrocephalus, and other afflictions have very little to do with it, *pace* Mike Wallace.

In the past society wasn't terribly shy about expecting parents to make sacrifices. In the event of an inconvenient birth or a deformed baby, there was sympathy and often active charity, but no suggestion that parental responsibility could be diminished. The parents were expected to draw, in emergencies, on resources of natural love. I daresay we realized that love was more than a mood: it was an act of will, too.

The English essayist Clive Bell once tried to define civilization, and he noted, after considering several models from ancient Greece to Enlightenment France, that no great civilization had ever placed comfort ahead of other important values. The sentimentalization of "unwanted children" is a form of the worship of comfort, sacrificing (under the pretext of reconciling) the right of the child to the comfort of the parent. The unrestricted availability of abortion can mean nothing else. In that respect, legal abortion-on-demand can only teach a very different lesson from what its advocates profess.

What is strange — at least at first sight — is that this callousness about the unborn should occur in a society where we are forever hectored to show "compassion" for others. Even as enlightened voices sternly urge us to take responsibility for unseen strangers, they soothingly release us from responsibility to our own children. If these two positions seem inconsistent, they can be politically harmonized: we can discharge the duties of "compassion" through politics, while the state relieves us of our nearer duties. Since this form of "compassion" is brokered by the tax-collecting and wealth-distributing state, the reasonable inference is that what we are headed for is the totally politicized society, in which relations among citizens replace relations of kinship.

To put it simply, we are required to love, and provide for, our neighbor, and our neighbor's neighbor, and our neighbor's neighbor's neighbor; but not our sons and daughters. This has quite literally given a new meaning to the word "compassion," which now implies a strangely politicized form of love; a highly unnatural love, at the expense of more natural kinds. The duties of the taxpayer begin to look more absolute than those of the parent. If the

parent chooses to go on welfare, not too many hard questions will be asked, since this is a state-enhancing choice.

It is apparently too much to ask that parents bear the burden of their own children. Anti-abortion people often hear the charge that they are "pro-life when it comes to abortion, but not when it comes to providing for those who are already born."

What does this really mean, to the extent that it isn't simply polemical invective? It means that if you oppose abortion, you must be willing to assume responsibility for the support of the child whose life you save. In consistency, if you prevent your neighbor from beating his son to death, you should be required to adopt the boy yourself.

But beyond that, it begs the whole question of parental duties. Reasonable people may differ on how much society should do in emergencies. But the argument we are now considering implies something more than that we have collective duties to the unfortunate: it implies that only supporters of unbridled redistribution have the right to oppose unbridled abortion. Unless you agree that the state should provide for all, you mustn't demand parental responsibility — though those who believe the former almost always deny the latter anyway. Heads they win, tails you lose.

Accidents do happen, and we can differ, as I say, about society's duties to the victims of accidents. But we should *not* differ about the rule that parents must care for their own children, born and unborn, and we must never make so many exceptions as to subvert the rule itself.

As the Mike Wallace example illustrates, we are obsessed with exceptions and hard cases and anomalies. In every area, from free speech to economics, we have formed the habit of sacrificing normal to abnormal, rule to exception, central to eccentric. But I repeat: *at some point* welfare subverts the work ethic, *at some point* abortion subverts the family (intrinsic morality apart). If only to protect its own good order (which is itself an aspect of social justice), society must *at some point* draw the line.

We seem to have forgotten that the normal needs firm support just as much as the abnormal needs special concern. Justice is like capital; mercy is like the interest. Unless we establish a rigorous justice, capable of some nay-saying finality, we will never have the

foundation for real mercy of the kind that heals; our humanitarianism will turn into mushy lenity. It was such a false humanitarianism that moved Chesterton to say of a contemporary that he was not only an early Christian, but the only early Christian who ought to have been eaten by the lions.

Our society's exceptionalism, as in subordinating law and order to exaggerated notions of civil liberties and social justice, has now led to a widespread revulsion against government itself. Normal citizens have begun to draw the line in their own way, as in tax revolts that simply cut off the flow of wealth to the state that has ceased to protect them even as it has increased its demands on them.

I think it is precisely the sense of outraged normality, in a different form, that lies behind the "single-issue" politics of abortion. True, this issue has drawn into politics hundreds of thousands of otherwise apolitical people. That may well be an unhealthy sign, but it isn't their fault. Gabriel Almond and Sidney Verba, in their book *The Civic Culture*, wisely argue that the "failure" to vote may be a sign of health in a democracy, since it indicates that politics doesn't agitate people very much, and the non-voter feels he can trust the voter not to impose intolerable conditions on him.

Unfortunately, the anti-abortion movement may be a sign that the old trust in our political system has been seriously violated. Formerly acquiescent people are registering their feeling that those who have handled things so far have *not* handled them well, or even tolerably. It may be that their opponents are sincere in likening them to vigilantes. But even vigilantism is often a real response to a felt need.

If, tomorrow, the Supreme Court were to legalize infanticide, we would certainly see the same phenomenon on an even grander scale. Millions of people would suddenly feel — and say vocally — that their whole understanding of the kind of society we are had been shocked to the core. They would in many cases go on to a deeper understanding of what was wrong, and to a more comprehensive political position. But their first impulse would be to *reverse this law* — and for that their opponents would call them "single-issue fanatics." (No doubt adding something snide about the stridency of the phrase "killing babies.")

I hope the analogy makes my point: to legalize a practice like abortion, however common it may be, is to tear up the social contract. It is to challenge deeply rooted feelings as to what human life and society are all about. To me, at any rate, it seems clear that there are now two warring views among us as to whether the state or the family should be the formative social principle in America.

The pro-abortion side can bear plenty of disagreement —but only as long as it contains its opposition by suppressing the radical implications of legal abortion, carefully focusing attention on "hard cases." In keeping with its general deviousness, the pro-abortion side fears recognition that abortion is a crucial issue, one of those issues that define the very nature of a society. And it condemns that recognition as obsessive —"single-issue politics" — to prevent the general public from realizing the stakes. For this reason, the proper rejoinder from the anti-abortion side is to insist that its own cause is a matter of "crucial-issue politics."

It is important to make provision for the widow and the orphan. But it is even more important to make provision for the family. The old medical adage *primum non nocere* — above all, do no harm — is pertinent. If the family didn't exist, it would be no particular misfortune to be an orphan; but you can't help the orphan by abolishing the family.

An Addendum to Abortion

John Floyd Matthews

A PERSISTENT ARGUMENT put forward in favor of abortion is that it is unfair to children to let them be born to parents who do not want them. To grow up loveless and maltreated, among people who may well not give them even minimal care, is said to be a fate considerably worse than death, and hence best *prevented* by death.

As one earnest and deeply concerned partisan of the Woman's Movement told us recently: "If you knew what happens to these unwanted children, you would think more than twice about banning abortion! It prevents *awful* things from happening."

There is a certain plausibility to this, as anyone who has ever seen a badly neglected or misused child can appreciate. Things do happen to children which are perfectly horrible; things so shameful and appalling as to be almost beyond belief. If beleaguered Christian society can hold among its greatest triumphs the fact of having been the first in history to proclaim the glorious dictum: "Suffer the little children to come unto Me, for of such is the Kingdom of Heaven," still it remains true that even among supposed Christians there are those whose conduct toward the very young is so brutal and unfeeling as to make the "suffering" of them not a matter of loving permission, but rather a gross and cruel affliction laid upon them. What is done to them, by acts of commission and of omission alike, is sometimes so monstrous as to be well beyond the capacity of most unsanctified humans to forgive.

But just how does all this lead us to the conclusion that unwanted children should, for their own safety, be exterminated before birth? There have been plenty of them in history who have grown up to be marvels of virtue and/or achievement — from Charles (The Hammer) Martel, who lived to become the grandfather of the wise and mighty emperor Charlemagne, right down to the present, when some of our most celebrated contemporaries

John Floyd Matthews is Richter Professor of American Civilization at Brandeis University; he has written extensively for stage, screen, and television, and on painting.

(including the exuberant New Zealand coloratura who sang Handel so dazzlingly at the recent Royal Wedding in London) have begun their lives by literally being abandoned or given away. There is a finality about abortion, however well meant, that prevents the possibility of a bad life *or* a good one

But beyond all that, it does seem hard (even for a confirmed "feminist") to ignore the disconcerting fact that dreadful things happen, sometimes, even to the most *wanted* of children. Being loved is a vital need all infants share, but it is no sure defense against misfortune. Men have noted to their sorrow since the beginning of human history that to be adored and comforted and yet afterwards to be orphaned or abandoned is not a fate unknown to our species. Accidents and poverty can change the most doting of adults into brutalized and incompetent parents. And worse still — worse almost beyond imagining — is the fact that there seems to be no way in the world that any amount of familial devotion can spare the occasional tragic and misfortunate child the fatal ministrations of such maniacs as the one who went about New York shooting youngsters under the pseudonym "Son of Sam," or the equally dreadful killer of all those little black boys in Atlanta, Georgia (who slew them, loved and unloved, wanted and neglected, all alike, without mercy).

There are inexplicable persons in this world who can harm children just as much as unwilling fathers and mothers can. Gilles de Rais, who began as a companion in heroism with Joan of Arc, and who ended his life years later in infamy as the gross, perverted monster known as "Bluebeard," was not the parent of the hecatomb of infants whom he slaughtered for "pleasure." He had nothing to do with them at all, save for their destruction. For his neighbors and their young, he was as bad as a pestilence, as bad as a war, as bad as a famine . . .

Which only serves to remind us, of course, that there are worse things in the world than even Gilles or his modern counterparts. Worse than the wickedness of any single man or woman, there are vast and terrible phenomena at large on earth, with which our species has had to try to live ever since the end of Eden. We are not new to sorrow; we are all of us born to it, and there are things in every human generation whose very names ring out like an apoca-

lyptic litany of calamity. The whole history of the world's wars is a history of the death of children, just as the history of the world's plagues and famines is also and of necessity the story of the suffering of children. But is this an argument for killing them all off in advance in embryo — or is it an argument for peace and plenty and the prevention of disease? Is it really better to destroy unborn infants on the off chance that some of them might be abused or neglected — or to shoulder, instead, the somewhat larger social burden of seeing to it that they are cared for and nurtured and protected from perversion?

These are questions which not only raise the specter of some plausible *alternatives* to "preventative abortion," but which also remind us of what used to be called in more modest times the "inadequacy of human wisdom." We can do better for our children than abortion, perhaps — but even with the very best and wisest of social arrangements, we cannot yet spare ourselves pain and lamentation. There are things we can cure, but not cancer. There are things we can prevent, but not death. Of all who ever dwelt here since the beginning of time, we are the only ones alive now, and we shall soon be gone . . . and what a world of weeping *that* signifies.

What we are talking about is something men have pondered almost from the beginning of consciousness; the implacable and tantalizing mystery of accident, of misfortune and evil. Like Job, mankind has forever prayed about it and mourned over it; been tormented by it, sometimes, into wonder and worship, and at other times into despair and doubt.

Indeed, the fear of what is about to happen to *all* of us in this life (the sorrow, the inescapable losses) formed the fundamental basis of the famed "wisdom" of the ancient, truth-telling Greek satyr, Silenus. "Best it is," he murmured, "for Man never to be born at all!" Which was precisely the same view held by the founders of Hinduism and later by the "compassionate" Buddha. Brooding on the brevity of our lives and the inevitability of human suffering, innumerable Indian sages settled with profound pessimism on the "divine" condition of "Non-Being" as the only possible answer (short of some as-then-undreamed of salvation) to the agonies and indignities, the humiliations and frustrations, the tears,

miseries and (to them) apparently hopeless supplications of — not just a few endangered children born to parents who did not happen to want them — but of *everybody*; the entire vast, lost, endlessly replenished human race.

There are some striking differences, of course, between viewing life with such all-embracing Oriental horror and disgust as to wish not to be born (or *reborn*), and the singular contemporary "feminist" notion that the best way to stamp out misery and misfortune among the "unwanted" is simply to get rid of them prior to birth. Not even the unblinking Buddha ever went quite so far as to advocate *killing* people in order to spare them suffering.

For him (as for most Hindus and for many Christian sects as well) the only way for mankind to escape the perils and catastrophes of temporal existence was for us to lead lives of purity, austerity and abstinence; to forgo all fleshly pleasures and indulgences, and to yield neither to sex nor to any other sort of temptation. Which is not, obviously, quite what the advocates of "preventative" abortion have in mind. If, on the one hand, they seem to be the first people in history ever to come up with the odd notion (and put it into practice) that there is a certain virtue in suppressing the lives of unborn children on the grounds that they will probably be better off that way, and to claim that it is somehow an act of kindness to kill infants in the dark of the womb before they can quite emerge (unwanted) to try to share the sunshine with the rest of us — there is *nothing* in all of this which has ever been meant even remotely to suggest a rejection of that "world of the flesh and the devil" which so many of their more serious predecessors have so often worried and wondered about.

To the contrary, if one were to propose to any of them that since it is arguably best for some children not to be born, perhaps it would be even better if *nobody* were to be born — the proponents of compassionate abortion would probably think of one as a stark, raving lunatic. They may not agree with Aristotle's dictum that "life, though no good attend it, is itself a good," but on the other hand they have nothing at all against the "way the world is." To the contrary, the greater its "physicality" and "sensuality," the more reason they feel for wanting to go right on living in it and enjoying it. Their views, after all, are as far removed from philos-

ophy as they are from piety and faith. The only children they have in mind to be denied the right to life are those of women who simply do not wish to have them.

And just there, oddly enough, is the whole crux of the matter. What is made at first to sound as if it were something done in order to do the unborn *baby* a favor, turns out instead to be something done merely in order to try to do the parents a favor. What abortion is all about is sparing what used to be called "appetitious sluts and libertines" the ugly necessity of having (or caring for) their own children.

Unlike the sorrowing Buddha, unlike even the strangely human sympathy of the ugly little woodland god, Silenus, there is nothing at all profound or cosmic involved in the pro-abortionists' pessimism about what will happen to unwanted children. To them, it is merely one of those small, medically correctable problems which is naturally bound to arise, sometimes, now that humanity is finally and triumphantly at liberty to enjoy that full and uninhibited pleasure of sexual self-indulgence which has recently been proclaimed as everybody's supreme biological birthright.

A "birthright," of course, only for those lucky enough to get safely beyond conception to full term and delivery. Something over one out of four, nowadays, do not make it; not because of disease or pre-natal disability, but simply by the deliberate choice of their ungrieving and unwilling mothers. For better or worse, in 20th century America, unborn babies have come to be viewed by a large segment of the population as nothing more than the accidental and readily disposable by-products of the overwhelming necessity society now feels to preserve the "sexual health" and well-being of irresponsible adolescents and concupiscentious adults.

This is not the place to try to trace the history of our current national obsession with the idea of sexual gratification as the main object of life, nor of the corollary notion that the suppression or inhibition of any form of physical or emotional appetite (whether for sex or drugs or the sort of stimulation that comes from witnessing or participating in violence) is essentially antagonistic to the full and "natural" development of the human personality.

Suffice it to say that we have become a country in which it would be quite difficult, probably, for most of its original founders

to recognize their own handiwork. Who would have thought, for example, that the once fought-over rights of freedom of speech, press and "expression" would have become mainly a license, in our own day, for the activities of pornographers, flesh-peddlers and the purveyors of verbal obscenity? Who would ever have imagined that what we would do with our children under the banner of "liberty" is to turn them into the world's greatest commercial market for what previous generations would have thought of as unspeakable perversions and corruptions? It is at least worth noting, certainly, that the largest single segment of our nation's commerce and industry, nowadays, is *not* devoted to housing or food or fundamental necessities; it is simply (after "national defense") the provision of toys and drugs and entertainment and "fashions" and sexual stimuli to enormous numbers of young people, who have been taught the "irrelevance" and unenforceability of traditional moral standards at about the age of seven, the virtues of social rebellion at about ten ("Defy Authority," as the popular Massachusettes bumper-sticker advises), and to begin experimenting with fornication at about the age of twelve.

These are the people who often "grow up" (if that is the word for it) having been led to believe that the only wholly unforgivable thing in the entire American vocabulary is the word "no!" To have it said *to* them is an insult; to say it about anything to one another (save in jest) is at the very least an overt sign of unfriendliness and at the worst, evidence of being weird, immature, and/or some kind of an "elitist." Which is why the public press was able to anounce rather proudly the other day that among Americans between the ages of 12 and 19, 70% of the girls and 80% of the boys have had sex with somebody; that once started, most keep right on trying it with various partners; and that less than 4% of them are married.

It is no good calling this sort of behavior "permissive." What it has become, for all practical purposes, is downright obligatory. In slum and suburb alike, the notion of chastity (and/or sexual continence within the bounds of love, marriage and personal responsibility — which was for whole millennia a sacred and often lived-up-to ideal) is now treated with such scorn and contempt as to be not only the object of widespread public ridicule (as in Richard Cohen's recent widely-syndicated Washington *Post* col-

umn which viewed chastity as a preposterous state resulting mainly from "acne" and "pimples") but also as a downright threat to human health and happiness.

Indeed, given the quality of American "popular education," the content of the American press, movies, television, and the primal importance currently assigned to "peer pressure," there is nothing at all in the daily experience of a great many American young people nowadays to suggest that there is anything more important in the supposed "real world" of "adulthood" than the continual quest for "sexual fulfillment" or anything worse than "repressing one's instincts." With the result, of course, that for perhaps the first time in the history of Christendom, what baffles and troubles them and keeps them awake nights is not *temptation* but the terrifying question of what must be wrong with them if they have failed to succumb to it.

What is most curious about all of this is that somewhere along the line we also seem to have become the first people since the primitive Polynesians to have lost all sense of the connection between sexual intercourse and the germination/conception of children. In an age so sensitive to biological casuality that we are capable of tracing the Great Chain of Being right down to the tiniest snail-darter or lousewort, there is somehow not the slightest hint, in the vast outpouring of literature on "sexual fulfillment," that the most natural of its consequences is the creation of a new human being!

That is no longer, one gathers, what sex is all about. In all the countless pages of interviews, confessions, "manuals" and popular surveys on the subject, there seems to be almost uniform agreement among the "liberated" that sex now leads only to ecstasy and "release" (or frustration and "dependency") but never, so far as one can tell, to anything so uncomfortable and undesired as pregnancy.

With the result — if statistics can tell us anything at all about contemporary America — that over one third of the babies conceived during 1980 came as a completely unwelcome surprise! Looking for nothing but innocent and urgently necessary sexual gratification (as they had been taught to do ever since puberty) what the unwilling "mothers" got was what in good feminist lan-

guage is best described as an "illegal invasion of their private persons by an unwanted fetus."

You will notice that in this view of life *it is not the girl who is responsible for the baby — it is the baby who is responsible for spoiling the fun for the girl.* Which is why, last year alone, nearly a million and a half of them had to be got rid of and destroyed.

Let us be clear about it. What we live in now is a world in which human sacrifice has come back into fashion. As once with pagan altars, so now every respectable town in America is expected (nay, as Framingham, Massachusetts recently discovered, *required by law*) to house its own friendly neighborhood abortionist's clinic (mini-Belsens, one might call them) in which we can coolly exterminate the unwanted young as a way of appeasing the not-to-be-denied hungers of their unloving parents' aching flesh.

The figure of speech is perhaps a bit unfair to our savage and benighted ancestors. To them, at least, the sacrificed child had some importance and significance; it was the best and rarest gift that primitive communities could think of to placate their awful and malevolent deities. Not only that, it was immortal; its soul would be rewarded for the service of its body's "death for the good of the others." But to a modern abortionist and his customer, on the other hand, the baby and its life have no meaning or value whatever. It is nothing but a mass of unwanted living protoplasm to be scraped out, flushed out, poisoned, anything at all to get rid of it. What we seem to have managed is somehow — in the matter of sensibility, anyway — to have gone *downhill* from barbarism. (Our time is a very good argument for the existence of an afterlife; one needs a Hell, at least, to redress the crimes of today in the long tomorrow of eternity.)

For the sake of "sexual liberty," then, we kill off the unborn by their millions; every four years as many as all the people who died in the oft-memorialized and regularly lamented "Jewish Holocaust," but without a prayer or a monument, or even (in most cases, apparently) so much as a sigh. It is the only continuing peacetime massacre of such huge dimensions in all of human history. Since legalization, *in America alone,* the number of its victims is already half as many as fell before the dreaded "Black Death" in the 14th century; and in another six years, we will actu-

ally have surpassed the entire probable total of that vast and incomprehensible medieval calamity and be moving along toward some new and monstrous numbers of our very own. And all of this in America, the kindly and golden, the generous and benevolent — that weeps for whales and will not let so much as a dog be whipped or an eagle be threatened without an outcry and a call for action!

It can be argued (and often is) that none of this matters. It is none of our business; simply a matter of "choice." After all, the world is still full of love and beauty; there is an astonishing number of American youngsters who not only survive their own mother's pregnancy, but even a modern American childhood. They *do* grow up, many of them (in spite of their "education") with precisely the same virtues and affections, the same capacities for loyalty and love and responsibility, the same *humanity*, in brief, which has been for so long the glory and the goal of our lately so much-maligned Western Civilization. So what is there to worry about? If other people choose to kill their children instead of letting them be born — is that our problem?

It used to be thought so. Children used to be protected, in our society. Death was stopped, if it could be. Do you suppose anyone short of a madman would have *encouraged* the Black Plague? Or structured a politics around "protecting our right to be bubonic" — as part of the glorious ideal of "freedom of choice"? The difference between past and present is nowhere better illustrated than in the fact that the extirpation of all these millions of growing young lives, nowadays, is a *deliberate* thing. It is not accidental; it is agitated for and *voted* about and made part of the law of the land — and according to what is advertised as "the very best of modern thinking," that is exactly as it *should* be; a sign of democracy!

We live in a "culture," now, in which what we are supposed to get used to celebrating is the *differences* of opinion, not the rightness of any of them. And if that seems a little mad at times, we are simply not showing sufficient appreciation for the varieties of human enthusiasm. What we need to do, they tell us, is look on the bright side.

And the bright side of abortion, naturally, is that the people who march about in front of public buildings chanting and waving their

fists in unison in support of the continued right of liberated "females" to destroy their own babies, are only doing it out of compassion for the unborn infants. Looking at the expressions on many of their faces, one is perhaps irresistibly reminded of the implacable Madam DeFarge, or of those cold-lipped Iranian girl students who periodically parade the streets of Teheran shouting mechanically for "Death to the Great Satan America!" But that is wrong; there is nothing of *that* sort involved, actually; *no* hatred or antagonism; it is merely the expression of social concern and benevolence.

Well, possibly. It still takes some getting used to though — the idea that the best way to keep a baby from harm is to kill it, or that the best way to keep a mother from abandoning or injuring her young is to exterminate them. One is still tempted (regrettably?) to cling to such old fashioned and well-tried solutions as educating girls in personal and sexual restraint and responsibility, or even (in cases where that doesn't quite work) simply taking *care* of the infants for them by means of institutional or individual adoptions. There are thousands of willing "caretakers"; goodness and mercy are no more extinct in our time than are much-applauded cruelty and vice — and one would have thought that there are plenty of wanton "females" whose children are worth having, just as there have been innumerable lecherous "males" whose seed has often turned out worth preserving.

But that is not to be, apparently. Not any more; we simply are not up to it. The whole thing is too socially difficult, not to say "discriminatory." Which is why, in the end, we are told to come back to panaceatic abortion. No child carried by a woman who does not want that child has any right to be born. For its own sake it should be killed, they say, quickly (nobody *knows* whether or not painlessly) not only to preserve its parents' continued right to uninterrupted sexual freedom and lubricity, but also to prevent either of them from doing evil things to it!

Could anything be clearer — or fairer? Given the fact that its mother and father are willing to kill it already, surely any infant's life, in such custody, could only be an appalling misfortune. Which is why (to the pro-abortionist) what we need is not a law to prevent the *misfortune*, but a law making it possible to prevent the birth.

Very well, then. Shall we agree with that — kicking and screaming a bit, perhaps, but going along, now, for the sake of fitting in with the spirit of modern "enlightenment"? If we do, then it is perhaps worth alerting our feminist friends to the fact that the logic of their case seems to demand that something *more* be said; the matter is not quite so readily concluded as they might imagine.

Consider, for instance, that if there is a real social justification for legalized "medical interference" into the biological problems of people who are "likely" (as the earnest lady mentioned earlier insisted) "to be incapable of sustaining the burdens of parenthood" — is it not clear that our public responsibility does not stop simply with the elimination of the poor, despised, unwanted "fetus"? After all, if the prevention of cruelty to prospective children is such an important element in the case for abortion, then it seems equally reasonable that people who are so totally unfit to have children as is evidenced by their consent to abort should then also be prevented (one might think) from *ever* having any.

Indeed, the further obligation of society in such cases seems (on a strictly rational basis) to be fairly obvious. The same "social hygiene" which justifies abortion would also seem to make mandatory the *sterilization* of all those who confess their incapacity for parenthood by resorting to permissible infanticide. If they choose to slaughter their own unborn progeny, is it not then only proper and compassionate for us to make certain that they can never (male and female alike) be able to do it to *another* child?

There is nothing unfair about this, nothing at all "punitive." It will not interfere in any vital way with the all-important sensual gratifications which we are all honor-bound to protect and encourage nowadays. All it does is to complete the equation so eloquently argued by our self-proclaimed "humanitarian" pro-abortionists. If the bare, unproven potentiality for being unkind to children is something horrible enough to justify killing the infants in advance in order to prevent it, then surely there is nothing at all unreasonable about requiring a little extra surgery. All it does is to extend the desired protection to cover *future* cases.

There would be no ethical objection to any of this from the American Medical Association, by the way. Just as the legalization of abortion opened up a thriving and profitable new field for

hitherto *banned* medical procedures, so too, the mandating of sterilization has economic advantages that cannot really be blinked at by today's professional "healers." One remembers that teaching women to smoke in the 1920's promptly doubled the market for cigarettes in this country; similarly, with the introduction of obligatory sterilization, one immediately guarantees that for every million of aborted children hospitals and medical personnel are bound to have at least two million additional new patients in the form of *parents* to be treated surgically. The thing is a medical gold mine.

But of course it also does raise the question (from a logical point of view) of what should be done with the doctors involved. If possible cruelty to children merits protective abortion and sterilization, then surely we ought not to overlook the social difficulty posed by those very odd "physicians" who nowadays make such a good living out of killing "fetuses" for money.

Given the thesis we have been discussing here, is an abortionist really "fit" to have a baby? Fit to care for it and love it? Can a man who exterminates children before they are born be trusted not to maltreat them *after* they are born?

This, one would suspect, is more properly a profession for eunuchs! The sort of man who is willing (if the price be right) to swill an embryonic infant lifeless from its mother's womb like so much garbage, would clearly no more make a suitable Daddy than would the psychologically irresponsible people who hire him to do the job in the first place.

Indeed, if unwilling parents can be said to be probably bad for a child, the abortionist can be demonstrated to be *certainly* bad for a child. After him, there *isn't* any child. Should he not, therefore, be sterilized too? If for nothing else, then at least for the sake of his *own* possible offspring?

At the present moment, those who want to destroy their unborn babies (and those who do the dirty business for them) have every legal right to do it. But the same argument used to justify abortion also clearly justifies sterilization — for the doctors, the nurses, the wretched and unwilling mothers and fathers all alike. "Not wanting" an infant enough to kill it (or being willing to help in the killing of it for money) should surely, by every compassionate tenet of modern secular orthodoxy, have as a corollary the obligation

never to be in the position of having one of one's own to kill again.

If abortion prevents cruelty, then sterilization prevents any repetition of the opportunity. Barring such out-of-date-concepts as "justice" or "the protection of the innocent," that seems to be about all one can ask of the law nowadays. But oddly enough, none of the proponents of abortion appears to have thought of it yet. We offer the idea to them now, free.

With this reflection: the Nazis began with sterilization and euthanasia, and *then* worked their way on up to mass extermination. We are in the curious position of now being able to reverse this process, coming to "sterilization of the unfit" (if we are "logical" and try it) only after already ending millions and millions more lives in our surgeries than the ill-famed SS ever managed to do in all their well-publicized "gas chambers" put together. This might be called "putting first things first," and shows us how to tell a social good from a monstrous evil; the thing that keeps *us* safe and wholesome, apparently, is the soothing word "compassion."

And if there is a problem, someday, over just who shall sterilize whom — over who is "unfit" and who is "unwanted," or over who should be "exterminated" and who simply made incapable of multiplication and fruitfulness — what on earth is that to worry about? Given enough time and enough misapplication of "science," enough "sensual gratification" for enough drugged and enervated young people (with enough increasingly untreatable venereal diseases), and enough "kind-hearted" medical people to help destroy or prevent the world's progeny from ever living long enough to be a "burden" to anybody, who knows? — even the extravagant prayer of the life-despising Buddha may well at last be answered favorably (at least insofar as "humanity" is concerned). There may simply be nobody left to concern him/herself about the world's unfathomable agonies. As a way to achieve compassionate "Non-Being" it may not be quite so quick as a nice nuclear war — but at least it has the advantage that, for a while at least, not *all* of us need miss the fun of a good interim sex-life. Only a few at a time, quietly, unborn on our way to extinction . . .

Still, for all its brevity and sorrow, life is so glorious, so full of beauty and wonder and surprises, that it seems utterly inexplicable that we can so shallowly waste and reject it. To do so for ourselves

is sad enough; to do it in advance for those who have not even been born yet, forbidding them the future without even the tiniest hope of a chance ever to savor its mysteries and enchantments, seems an act of such monumental emptiness and insensitivity as to be almost past imagining. We are very strange creatures. It is hard to understand us, or even, sometimes, to see how we could ever be forgiven.

Self-Made Men

Ellen Wilson

THE SELF-MADE MAN is a peculiarly American idea. Not that there haven't been men who "improved their condition" and "rose above their station" in other lands and times, but America chose to enshrine this as a national ideal, not only for the exceptional few, but for the masses as well. Benjamin Franklin suffered no embarrassment over his own rise from humble beginnings — he published them in his *Autobiography*, taking added pride in the difficulties he had overcome on the way to the Continental Congress and the French Court. The *Oxford English Dictionary* identifies the expression "self-made man" as "orig. U.S.," and cites this complacent sentence by James Russell Lowell: "We are fond in this country of what are called self-made men."

Now, just what kind of self-making is implied by this expression? Well, the standard fictional model was Horatio Alger — the shoe-shine boy or newspaper vender who, through intelligence, pluck, and perseverance, corners the market on wheat or pig iron and establishes a trust fund for the education of street orphans. Real-life Carnegies and Rockefellers, Edisons and Fords, had shown how the thing could be done. Or there was the Horace Greeley alternative of going West and making a new start on the American frontier. The West, with its great ranching kingdoms and legendary fortunes in gold and silver, offered potentially fantastic returns on a poor man's investment.

These were extreme successes, which America could not offer all her adopted sons. What she could offer them — what became the substance of the American Dream — was the chance to be dealt a second hand, better than the one just dealt by heredity or social position. Though few could be rewarded with riches, almost all could hope for a healthy competency which later generations might double or treble. Almost all could hope to break caste and jump a rung or two of the social ladder.

Ellen Wilson, our contributing editor, is a young writer whose first book, *An Even Dozen*, has already received widespread critical acclaim.

And these more realistic hopes — the chance to own land or manage a small business, to send their children to school — sufficed to draw great numbers from the Old World to the New. The self-made man, as Americans understood it, was someone who made for himself a better "self" than his native country or his ancestry or his station in life had made him.

But inevitably, there was more to it than that. America's self-made men had cut themselves off, in many cases, from homeland, local traditions and attachments, and now they discovered a need for a self-made philosophy of life, a way of making sense of the world which had treated them so differently from their parents. Christopher Newman, in Henry James' *The American*, sums up many such men:

> It must be admitted, rather nakedly, that Christopher Newman's sole aim in life had been to make money. . . . This idea completely filled his horizon and satisfied his imagination. Upon the uses of money, upon what one might do with a life into which one had succeeded in injecting the golden dream, he had up to his thirty-fifth year very scantily reflected. Life had been for him an open game, and he had played for high stakes. He had won at last and carried off his winnings; and now what was he to do with them? . . . A vague sense that more answers were possible than his philosophy had hitherto dreamt of had already taken possession of him . . .

Such questions, whether the product of a large fortune or a comfortable living, assailed many Americans, once they had acquired security and perspective enough to look back on what they had accomplished, and forward to what they might yet become. In response, many produced makeshift philosophies, designed to accommodate the peculiar needs of the self-made man. Sometimes they patched together attractive bits from other people's philosophies; sometimes they sought more exotic, more eccentric answers to life's questions. At any rate, it is simply true that from earliest times America has provided fertile soil for new and strange religions, or the transplantation of old and strange ones. She has indulged experimental communities from the time of the first colonists — the Plymouth Contract was the self-conscious creation of a community, and many early settlements experimented with communal food arrangements, different forms of local government, and codified religious beliefs. We take this sort of thing for granted now; we assume that everyone should search out his own form of

truth and find his own answers. But only a few centuries back, it was the exception, rather than the rule, for a son to veer from his father's beliefs, as it was the exception for him to choose a radically different occupation, or break out of his father's class.

It is easy to see how these acts of independence were related: how a man who has rejected his father's homeland, occupation, and station in life, would be uncomfortable with his God, his ethics, his sense of life's duties and rewards. Tocqueville identified this problem over a century ago:

> In the midst of the continual movement which agitates a democratic community, the tie which unites one generation to another is relaxed or broken; every man there readily loses all trace of the ideas of his forefathers, or takes no care about them. Men living in this state of society cannot derive their belief from the opinions of the class to which they belong; for, so to speak, there are no longer any classes, or those which still exist are composed of such mobile elements, that the body can never exercise any real control over its members.

All of us wish at times to remold God or the world a little nearer our heart's desire, and so it should come as no surprise that someone who had in one sense or another denied his father, would logically follow through and foreswear his God's name.

Of course, even in America this never became a universal phenomenon. Traditional religion, in the form of the major Christian denominations, flourished as well — and perhaps better — than it had in the Old Countries; national customs and ancestral folklore resisted complete homogenization in the Melting Pot. Still, the experience of starting fresh in a land which would not scoff at your pretensions or vigorously impede your efforts at self-improvement; the acquisition of a new identity; the invitation to social metamorphosis, if not in the teeming ethnic ghettoes of the large Eastern cities, then in the open expanses of the West, or vicariously, in the success of one's children — all these could provoke feelings similar to those of religious conversion. The successful man learns early to adjust old ways to new, trimming the hard edges of dogmatic belief or simple pieties or old wives' wisdom in the light of experience. He easily alters ideas as well as practice to changing circumstances; he grows accustomed to measuring high-falutin philosophy by pragmatic yardsticks. Tocqueville recognizes this American trait in a chapter from *Democracy in America* entitled: "Why the Ameri-

cans Are More Addicted to Practical than to Theoretical Science." It is as if America had anticipated Darwin's theory of biological evolution with her own theory of social evolution. In a sense, Social Darwinism preceded Darwin, flourishing long before Herbert Spencer adapted it for his own purposes.

It must be emphasized that the personality I have been describing, though perhaps an American type, is not prototypical — not a *standard* type. It is typical, because the American experiment encouraged independent or ambitious souls to remake mind as well as material circumstances; but it is not standard, because most Americans — like most Europeans or Asians or Africans — did not respond to the invitation, or did so only half-heartedly, acknowledging a right they chose not to exercise.

But what makes our own age so revolutionary — what makes it seem more independent than past ages — is a curious grafting operation: the ahistorical, anti-traditional biases afflicting much of the West today have been grafted onto our native talent for self-creation. The result is the self-made age. Not this or that individual, but an entire culture has attempted to escape the dead hand of the past, abandoning the old ways because of their very age, invalidating history because it lacks the advantage of our own modern perspective. Feminists, for instance, do not merely oppose millennia-old social patterns; they seek to eradicate them as outmoded. Assorted critics of free enterprise do not limit themselves to analyzing the logic of *The Wealth of Nations*; they claim that today's complex societies require mixed or managed economies. The argument is not that the past is wrong, but that it is *different*, and hence, irrelevant. It was molded by — and suited for — other times, different circumstances. At best, traditional answers may be suffered as possible solutions; at worst, they are suspect from the start.

Now, whether we are talking about self-made men or self-made ages, certain features stand out, and certain questions present themselves. For instance, what does it mean to say we have chosen a philosophy, an ethic, or a method of sizing up the world that "suits" us? How do we judge compatibility? More likely than not, in selecting bits and pieces from past models, we will follow a principle of utility, combined with simple appeal. But how can we be

sure that what appeals to us is necessarily good for us? Everyone is born with a set of rough edges, and there exist only two modes of remedy: either we must find some means of smoothing them down, or we must mold the world to conform to our own shape. When the surrounding world is deprived of a voice in this decision, chances are the surrounding world will suffer for it. It is not that the morally self-made man is necessarily arbitrary or uncompromising or unreasonable. But he is self-interested, and therefore keenly alive to any pain, discomfort, or even inconvenience he may suffer; the ills of the world, on the other hand, cannot compete as successfully for attention.

And so with self-made ages. The values they adopt, the ends they choose to pursue, may not be those most beneficial either to themselves or to posterity. It is not that we don't care about others, or about other ages; but how difficult it is to hear them through the din of daily concerns!

There is still another disadvantage under which self-made systems labor, and that is an inability to think of all the things that should be thought of: the overlooking of ends, contingencies, side-effects, alternative explanations or courses of action. Self-made systems are usually eccentric in the root sense: they are lopsided. Even internal logic cannot prevent them from bumping into rude facts which do not fit into the system, and this weakness is unavoidable to any individual system, since it must reflect the limits of the mind that made it.

Perhaps we might say that the solution is simply to be on the lookout for these unruly interruptions from the outside world, and take advantage of them to plug new data into the system. This is sensible advice, and unless we are like Chesterton's perfectly logical lunatic, we continually make such compromises. But so many errors in perception or behavior remain unthought of and hence, uncaught — like errors in a manuscript that has passed through the hands of a single proofreader. When our inconsistencies harm only others, we may have difficulty perceiving them. Even if we do, we may see no remedy, and accept as a necessary evil what another might easily cure.

And so it is, again, with self-made ages. To accept contemporary wisdom as a guaranteed improvement upon the wisdom of the

past, better fitted to solve our problems and satisfy our requirements, is to limit ourselves to the counsel of like minds, formed by similar experiences, exposed to similar influences, motivated by similar ambitions and desires. Outside influences, which might correct the balance, are neglected.

This is so even when a self-made society turns to law-making. By its own logic, it should dispense with Law in the upper case, and concentrate on laws adapted to contemporary needs, contemporary demands. It should, in other words, be attracted to a principle of planned legal obsolescence. Not only routine regulations — traditional lower-case laws such as traffic codes, speed limits, and the like — but even "principled" laws, which in language and formulation and legislative intent were designed as permanent safeguards of society, may be altered by mere desire for a more comfortable, more *comforming* legal reality.

Of course, laws formed for one set of circumstances may outlive their usefulness, and profitably be replaced by new ones. And from time to time ill-fashioned or even ill-intentioned laws are passed, and there is no reason why these should be tolerated once harmful consequences make themselves felt. But, to many of today's legal guardians, these are fine distinctions, and the ampler, more thoroughgoing alterations of the self-made society are preferable. The danger is that, lacking fixed standards from which to judge our laws — including our highest law, the Constitution — we will lose the ability to discriminate between transient opinions and eternal truths — may even come to doubt whether the latter exist, or can be known.

The paradox is that we repeatedly appeal to moral principles when arguing public issues. And these appeals usually receive sympathetic attention, so long as the principles appealed to are popular ones. Sixties-style, Vietnam-inspired pacifism was popular in this sense, although most Americans were not pacifist. But they sympathized with a hatred of war, and were uncomfortable with the arguments on which this war was based. The martial celebration of the *Iliad*, and the holy-war intoxication of the Crusades were equally foreign to their understanding of Vietnam. In this sense, most Americans shared more in common with Joan Baez or

the Berrigan brothers than with Godfrey de Bouillon or Richard Coeur de Lion.

The civil rights movement of the late fifties and sixties presents a similar case. Certainly many Americans shared in racial prejudice, but comparatively few defended discriminatory actions on moral grounds, and most considered civil rights protestors the principled party in clashes with segregationists. To this extent, the civil rights movement was popular, too, even in the early days.

Our problem, then, is not a refusal to consider moral questions, or a tone-deafness to morality, but an inability either to argue a rational morality, or to retain a traditional one. All very well to agree that peace is good and racial discrimination bad; to promote the conservation of our natural resources, to remind ourselves that we have a moral duty to the poor. But do these and other publicly-approved moral propositions rest on secure grounds, or are we content to regard them as self-evident? And if we regard them as self-evident, how do we explain the fate of other self-evident truths that earlier generations of Americans acknowledged?

This is a question suggested by many of the Supreme Court's decisions in the latter half of this century: by religious school cases; by school prayer and the succeeding "separation of Church and State" cases; by the sixties avalanche of procedural decisions involving treatment of suspects, the requirements of a fair trial, and the "evolving" definition of cruel and unusual punishment.

All of these decisions should have been providing food for reflection on what law means and how it is related to an overarching sense of right or justice. The wonder is how seldom judges in modern times have been moved to such considerations. And the mainstream judicial commentators have usually been content to discuss whether this or that clause of the Constitution may be interpreted in thus and such a way, bearing in mind our evolving understanding of the requirements of a democratic society.

This "evolving understanding" leads to expansive interpretations of constitutional language in cases of democratic procedure (election laws and civil rights cases are two examples), and restrictive interpretations in fundamental, first principle cases (the relation between religion and the state, the purposes of a democratic society, the ends of free speech). Modern judges seem most com-

fortable when tinkering with the machinery of government, and perhaps this is one reason why the courts have drawn such a sharp line between church and state. When church and state cases are reduced to jurisdictional disputes, they become much more mechanical, much easier to manipulate.

And so it is substance — what we believe in, what we can be assumed to believe in, as Americans — that suffers in a self-made age. Justice is replaced by fairness — defined as equal treatment — in an age which doubts what kinds of treatment are inherently "fair," or just. One reason why arguments about humanizing prisons receive great attention is that we doubt whether it is "fair" to make other people suffer, even if they are guilty of terrible crimes. Hence we are driven to judge prisons on whether they satisfy common standards of comfort and well-being. We lack the moral sophistication to discriminate between conditions that are truly brutalizing and hence immoral, and those which, though restrictive or unpalatable or deprivational, may be justified as punishment for a crime. And unless we explore questions such as these — substantive questions, rather than procedural ones — we will not be qualified to decide the extremely difficult question of what constitutes cruel and unusual punishment.

With this background, the Supreme Court's 1973 *Abortion Cases* should be easier to understand: they were agnostic on matters of substance, and confident on procedural questions of "fairness." On the essential question of whether or not the unborn is a living, human being, the court was insistently agnostic: Science does not know. On the question of legal rights — whether the unborn had ever possessed such rights; whether they should enjoy such rights now — the court betrayed only sketchy historical sense, but recited legal precedents with some assurance.

The 1973 Supreme Court decisions were faithful to the dual ideals of the self-made man and the self-made age. In deference to the former, no serious attempt was made to decide the key point at issue: whether the unborn "qualify" for the rights of personhood. That would be decided by each self-made man and woman. This much, at least, can be said for Justice Taney in comparison: that he forthrightly insisted blacks were inherently unqualified for freedom or the rights of citizenship. Though his judgment was morally

abhorrent, it avoided the judicial foot-shuffling of *Roe* and *Doe*.

In deference to the claims of the self-made age, the Court took into account the ostensibly modern wrinkles of "population growth, pollution, poverty, and racial overtones," which conspire — it isn't made quite clear how — to make legalized abortion especially responsive to "the profound problems of the present day." Abortion was once considered a heinous crime? — that was then, and this is now!

Decisions such as *Roe* and *Doe* cannot be explained away by the historical amnesia of our age, for in the case of nations, such amnesia is voluntary, and hence culpable. We have willed ourselves to forget past counsels in deference to "the profound problems of the present day." We have chosen evolution — as it is popularly understood — over development.

For evolution, in the popular (which includes the judicial) understanding, means becoming something you are not. Thus we can imagine circumstances under which one-headed men would find three heads more conducive to survival, and over the course of time, we can imagine a race of three-headed men threatening with extinction those remaining unevolved one-headed men. So the evolution of the Constitution seems to require the Constitution becoming unrecognizable, with this right popping out here and that right being yanked out there.

Development, on the other hand, means becoming *more* yourself, fulfilling the potential that should have been recognizable to all. The child is father of the man, because the process of development from one to the other can be traced.

And, in the case of the United States, the past is father of the present. The Founding Fathers may have been, as the title of Garry Wills' book put it, "Inventing America," but as the rest of the book shows, they were not making it out of whole cloth. They consciously referred back to an Anglo-Saxon legal tradition, as they referred to a natural law tradition in morality. Recognizing that there are limits, even in America, to one's ability to remake oneself, they designed a Constitution that would guide not only themselves, but (they hoped) succeeding generations of Americans. Though changes in that Constitution were inevitable, as the country grew and expanded, and the world changed with it, the nation's

founders assumed such changes would be developmental, rather than radical. They assumed there would be continuity, because they established principles of continuity.

It is the departure from such principles that threatens constitutional continuity today. And with that comes the threat of a national identity crisis — a realization that, like Henry James' Christopher Newman, we do not know what we are working for, what we are living for. In that event, a court of self-made legal theorists, providing for the needs of the present day, will offer no remedy.

The Justice Amendment

Francis Canavan

"NEITHER THE UNITED STATES nor any State shall make or enforce an unjust law." There is, of course, no such clause in the U.S. Constitution. No one is proposing that we add the clause to the Constitution by way of amendment. But it will be instructive to reflect on what would be involved if we did make this addition to the Constitution.

Let's call it the Justice Amendment. Some people, no doubt, would hail the Justice Amendment as the greatest advance made in law and government since the Declaration of Independence. For surely no government, either national or state, has the right to pass an unjust law, and if that is true, then we ought to say so in the Constitution. Anyone who is against the Justice Amendment, therefore, is against justice.

Our Constitution, however, is not a proclamation of moral principles but a charter of government. It confers powers on government and it imposes limitations on those powers. The Justice Amendment, if adopted, would not be a moral exhortation but a part of the supreme law of the land, and its effect would be to render every unjust law legally null and void.

But a constitutional provision is not self-enforcing. Some organ of government would have to apply and enforce the Justice Amendment. That organ would be the federal courts, with the U.S. Supreme Court at their head. Under the Justice Amendment, every act of the legislative branches of the national, state and local governments of the country could be contested before the courts as unjust and therefore unconstitutional, null, and void.

The courts would have to decide in each case whether the contested law was in fact unjust or could be allowed to stand. This means that the Supreme Court would also be the Supreme Legisla-

Francis Canavan, S.J., is professor of Political Science at Fordham University, and a member of the editorial board of this journal. This article has also been distributed by Public Research, Syndicated ().

ture of the United States, since it would have the power to strike down any act of every legislature in the land.

It would be idle to say that the Court itself would be limited by the Constitution, because the Justice Amendment would impose on the Court no limitation other than seeing to it that no unjust law was made or enforced. The Court would have the right, because it would have the duty, to determine in every case what justice is and what norms of justice govern the case. Justice would mean what the Court decided that it meant. That would be virtually unlimited power.

It would be not only the negative power to strike down laws as unjust. It would also be the positive power of framing public policy by telling the legislatures what kind of laws the Court was prepared to find acceptable as being just.

An important conclusion follows from all this: *every constitutional limitation on the powers of the legislative (and executive) branches of government is, ipso facto, a grant of power to the judicial branch.* If the limitation is clearly and narrowly defined, the grant of power to the courts is correspondingly small. For example, the Nineteenth Amendment forbids the United States or any State to deny or abridge the right of citizens to vote "on account of sex." But since the key terms — sex and the right to vote — are clear and unambiguous, there has been little for the courts to interpret and so there has been little litigation under the Nineteenth Amendment. But the Justice Amendment's key term —"an unjust law" — is broad and utterly undefined. The amendment consequently would be a blanket grant of power to the courts and would effectively make the Supreme Court the Supreme Legislature.

It may have occurred to you by this time that we already have a Justice Amendment in the Constitution. It consists of the Due Process Clauses of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth. By its interpretation of these clauses as including broad but undefined substantive rights, the Supreme Court has conferred on itself broad and undefined powers over legislation.

The key terms in these clauses are "liberty" (in the Due Process Clauses) and "equal protection," which tends to become synony-

mous with "equality." Once you give liberty and equality a substantive meaning and assign to the Court the task of protecting persons from infringements on their liberty or denials of their equality, you have given the Court a power with no definable limits: liberty and equality mean whatever the Court decides that they mean. This is a power just as unlimited as if we adopted the Justice Amendment and empowered the Court to define and enforce justice.

It is disingenuous to protest and say that the Court is only defending the rights which the Constitution guarantees to all of us. The Court defends "rights" which it "finds" in the Constitution without previous constitutional definition of them, the "right of privacy" being an excellent example. As a result the Court has become what it said, back in 1873, it did not want to become, namely, "a perpetual censor upon all legislation of the States." The Court has thereby transformed itself into a policy-making body.

Not surprisingly, there is now a political reaction against the Court's assumption of power. I have read in the press that there are 20 bills pending in Congress to limit or modify the Court's appellate jurisdiction. This fact is causing a great deal of fluttering in the journalistic dovecote. The Republic, we are told, is in danger because Congress is thinking of interfering with the jurisdiction of the Court. But I am not horrified by the mere thought of Congress using a power that the Constitution explicitly gives it. If the Court insists on cashing the blank checks of substantive due process and substantive equal protection, it should shock no one to discover that Congress, too, has some blank checks that it can cash. I doubt if the Republic will collapse because Congress cashes one or two of them.

In Pursuit of Lawless Judges

William Eaton

WITH THE CONFIRMATION of Sandra Day O'Connor, President Ronald Reagan filled the first vacancy in six years on the Supreme Court. Other Justices are likely to retire within the next few years. There is talk of a "Reagan Court," and expectation of radical changes in the Court's "philosophy," not least *in re* the most heated controversy surrounding Mrs. O'Connor's nomination — how she might vote on the abortion issue. The controversy is appropriate, for the abortion question amply illustrates what is wrong with the Supreme Court, and with equal force demonstrates why its ills cannot be cured by one or two, or even a half-dozen presidential appointments, whoever the President might be.

Nothing at all is said about abortion, or anything remotely relating to abortion, in the Constitution. Yet, in *Roe* v. *Wade* (1973),[1] the Supreme Court held, in effect, that every woman has a right to an abortion. Before 1973 abortion had been dealt with by the states as part of the power reserved to them under the Tenth Amendment. How, then, did it suddenly become a federal constitutional matter in 1973? Where did the new "right" come from?

An essential ingredient of the right to abortion was the "right to privacy," another "right" nowhere provided for in the Constitution. That right was announced in a 1965 case, *Griswold* v. *Connecticut*.[2] Appropriately enough, that case had dealt, not with abortion, but with the laws of Connecticut dealing with birth control devices and information concerning their use.

In *Griswold* the Court quoted itself in yet other previous cases — but not the Constitution — to derive its right of privacy. It referred to the "sanctity of a man's home and the privacies of life"; to a "right of privacy, no less important than any other right carefully and particularly reserved to the people"; and to "various guarantees" which create "zones of privacy." These cases, the

William Eaton is an attorney in San Francisco; he is currently writing a book on the Supreme Court.

Court asserted, "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that helped give them life and substance."[3]

A penumbra is a partly lighted area surrounding the complete shadow of a body, such as the moon, in full eclipse. The Court was quite right to characterize its right of privacy in *Griswold* as an "emanation" from such a "penumbra," for it had nothing better to go on. Certainly nothing in the Constitution. But witness how that "right" was used to create the right to abortion.

In *Roe* v. *Wade* the Court candidly admitted that the "right of privacy" is nowhere mentioned in the Constitution. But, it said, "In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment . . .," or in the "penumbras of the Bill of Rights," or "in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." Relying on nothing more than its own "penumbral" and "emanational" theory of constitutional law, the Court held, in *Roe* v. *Wade*, that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[4]

Professor John Hart Ely, of Yale Law School, termed *Roe* v. *Wade* "a very bad decision." To Ely, "It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[5] The decision, said Ely, makes no attempt to associate either side of the balance on the question of abortion with a value which can be inferred from the Constitution. In other words, the Supreme Court had no constitutional basis at all upon which to decide the abortion issue. It had no business making any decision, either way. It had no constitutional authority even to consider the issue.

The case of *Roe*, and of *Griswold* before it — and the controversy that swirled around the nomination of Mrs. O'Connor — are all symptoms of the same deep and virulent illness which has come to infect the Supreme Court and the judicial system as a whole. The root of the illness is to be found in a fundamental constitutional dislocation.

The Constitution is designed to prevent the abuse of power by separating power among the three branches of government and by providing for certain checks and balances among the branches.

The Constitution is also designed to guarantee what it provides by requiring a rather difficult amending process, as set forth in Article V. Yet the Supreme Court has handed down decision after decision in effect amending the Constitution — just as it did in *Roe* and *Griswold* — without so much as a blush of wrongdoing. The Court has on numerous occasions usurped the powers of Congress in a similar matter.

Imagine that tomorrow morning's newspapers were to announce a *coup* in Washington, and the establishment of a new governmental agency called the Council of Elders, with the power to overturn any Act of Congress, or of the President, or of any agency of state government. Imagine that the Council was further invested with the power to amend the Constitution as it might see fit in order to justify its new dispensations of power; that the Council was appointed for life; was in no way answerable to the people; was composed of but nine members, and was to rule by a majority vote of those nine. Such a Council of Elders would not be at all unlike what the Supreme Court has in fact become.

New appointments to the Court can do nothing to remedy the cause of its transgressions. Appointments to the Court, even by the wisest of Presidents, are a kind of "Presidential Roulette"; nobody can know how a Justice, once appointed for life, will behave over the years. If the "philosophy" of the Court is changed by new appointments, history suggests that that will only mean that its transgressions into forbidden constitutional realms will be for new causes and different reasons. But the transgressions will continue.

The fact is that there is a dangerous gap in the constitutional defenses provided by the Founding Fathers to assure against the abuse of power. There is no agency of government directly assigned the task of checking on possible abusive accumulation of power in the Supreme Court. This is a curious omission in the system of separation of powers and checks and balances written into the Constitution — a breach through which the Court has marched repeatedly to invade the legislative and amending authority of the Constitution. The invasion began on the eve of the Civil War.

In the chambers of the United States Supreme Court on March 6, 1857, packed rows of spectators rustled in their seats awaiting

the entrance of the nine Justices. A legal decision of momentous importance was about to be announced. The issue of slavery was sweeping the nation towards civil war. Growing ranks of abolitionists insisted, at the least, that slavery be prohibited in the nation's new western territories, an indictment of their way of life which slave-owning Southerners refused to accept. The buzzing spectators may have sensed that the Court's decision that day could change the course of history, but did they realize that the legacy of that decision would stretch far beyond the issue of slavery to the function of the Court itself?

The crowd gathered in that Washington courtroom knew full well that the nation had failed to resolve the issue of slavery in the Missouri Compromise of 1820, by which Congress had "forever" prohibited slavery in most of the territory acquired through the Louisiana Purchase of 1803. That compromise did not last. By 1854 it was replaced by the Kansas-Nebraska Act which gave each new territory the right to decide the slavery question for itself. Now, in 1857, a Missouri slave named Dred Scott had forced the Supreme Court into the vortex of national dissension.

The anxious crowd rose to its feet as the nine members of the Court — five from the South, four from the North — took their places behind the imposing bench of supreme judicial authority. Every eye in the room was fixed on the figure in the center of the bench, Chief Justice Roger Brooke Taney, a man past eighty, in failing health, thin and emaciated. The only sound in the room as Taney opened the pages of the Court's decision was the rustling of paper in his frail old hands. Then, in a voice as ethereal as his appearance, the Chief Justice began to read aloud his momentous decision. He read for three hours, and what he read thrust the Supreme Court itself into a role beyond the bounds of law, and unchecked by any other branch of government. The Court set itself as the final arbiter of issues formerly within the legislative jurisdiction of Congress, and changed the Constitution to justify its action.

The audience strained to hear his rasping whisper as the Chief Justice addressed the case of Dred Scott, the slave who claimed to be free. Scott, they knew, had been taken by his master from Missouri into free territory covered by the Missouri Compromise, and

later returned to Missouri. There he had sued in state court, claiming that residence in free territory had made him free. The Missouri Supreme Court had held that, whatever claim he might have had elsewhere, once he returned to Missouri he was in a slave state, and remained a slave. Scott had then sought to press his claim in the federal courts, leading to the decision which Taney was about to announce.

Negroes, the Chief Justice said, "were not intended to be included under the word 'citizen' in the Constitution," and so could not bring suit in federal court. This was because, "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations," Taney informed us, adding that they were "so far inferior, that they had no rights which the white man was bound to respect . . ."[6] Taney recognized that the Declaration of Independence, in stating that "all men are created equal," apparently meant to include the entire human race. However, he announced as the majority opinion of the Supreme Court that "it is too clear for dispute that the enslaved African race were not intended to be included."[7] The Court's decision meant that no Negro, even if free and living outside a slave State, could ever claim the rights of citizenship. In any event, Taney agreed with the Supreme Court of Missouri that Scott remained a slave since he had returned to Missouri. Whatever else might have been said, it was clear enough in 1857 that if a person were a slave living in a slave State he could not claim the rights of citizenship. That is all the Court had to hold to dispose of the case.

But the old Chief Justice, the fever of his cause burning upon his ghostly countenance, did not stop there. As his faltering voice dropped to a whisper, he delivered the blow which would reverberate over the decades as a model of judicial arrogance and usurpation. Congress, he read, had no authority to prohibit slavery in the new territories, as it has attempted to do in the now-superseded Missouri Compromise. To do so, he stated, would be to deprive the slaveowner of his property — the slave — in violation of the Fifth Amendment's "due process" clause — no person "shall be deprived of life, liberty, or property without due process of law."

As we shall see, the due process clause was never intended to

have any application to legislative acts. Taney reached back to declare the Missouri Compromise unconstitutional retrospectively so that Dred Scott could claim none of its benefits. In using the due process clause of the Fifth Amendment as he did to accomplish this purpose, he in effect amended the Constitution in violation of the amending process set forth therein. And in retroactively repealing, by judicial *fiat*, the congressionally-enacted Missouri Compromise, he invaded the legislative powers vested in Congress by the Constitution. This momentous decision was rendered by a five to four vote.

Dred Scott marked only the second time in its history that the Supreme Court had declared an Act of Congress unconstitutional. The first occasion was in 1803, in the famous case of *Marbury* v. *Madison*,[8] in which the Court created for itself the power of judicial review, and at the same time carefully defined the limits of that power.

The power of judicial review was designed to allow the Court to strike down as unconstitutional any act of Congress, the executive branch of the federal government, or acts of state governments, in conflict with specific provisions of the Constitution. It is a power generally regarded as legitimate, so long as the Court adheres faithfully to the Constitution in its exercise. But what Taney did was to change the meaning of the Constitution, and then use that changed meaning to destroy congressional legislation with which he disagreed.

Not surprisingly, the arrogance of Taney's *Dred Scott* decision stirred up a firestorm of anger and denunciation. Historian George Bancroft, in a memorial tribute to President Abraham Lincoln, observed caustically that Chief Justice Taney, "without any necessity or occasion, volunteered to come to the rescue of the theory of slavery."[9] Abolitionist Senator Charles Sumner attempted to sabotage the placement of a memorial bust of Taney in the Supreme Court Chamber after his death in 1864, urging instead that Taney's name be "hooted down in the pages of history."[10] In one of his famous debates with Stephen Douglas, Lincoln himself warned his audience to

> Familiarize yourself with the chains of bondage and prepare your limbs to

> wear them . . . if elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people.[11]

Lincoln pursued the theme, and struck at the root evil of *Dred Scott* in his first inaugural address. He charged that

> . . . if the policy of government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers . . .[12]

Years later Theodore Roosevelt described Taney as "a curse to our national life,"[13] while constitutional scholar Carl Brent Swisher, commenting on *Dred Scott*, reflected that "no decision in American history has done more to injure the reputation of the Supreme Court."[14]

It may well be that it was the ghostly voice of the old chief Justice, as much as the guns at Fort Sumter, which fired the opening salvo of the Civil War. Yet, though he was denounced, and even vilified, over the substance of his decision in *Dred Scott*, few of Taney's detractors perceived the truly monstrous nature of the decision. It was the precedent Taney set for the Supreme Court, as an institution of government — not his futile attempt to save the dying institution of slavery — which made a lasting impact. Taney taught his successors on the Court that they could tinker with the Constitution to their own liking, and then pass off the results as constitutional law, even though the "law" which they thus imposed had just been invented by the Court for the occasion at hand. *Dred Scott* was the Court's first bite of the poison fruit of illegitimate power.

Despite Taney's effort to save it, slavery was abolished by war, by the Emancipation Proclamation, and finally by the Thirteenth Amendment to the Constitution. Gradually, as the industrial energy generated by the Civil War produced a continent-wide chain of mines, mills, and factories, new political and economic issues surfaced. Dangerous and exploitive conditions in many mines and mills resulted in growing pressure for remedial measures, and in state after state legislation was passed to regulate the worst abuses. Meanwhile, on the Supreme Court, quiescent for many years after the *Dred Scott* debacle, a new and strong-willed majority was forming, one which yearned once more to taste raw judicial power.

Among the entrepreneurs of the burgeoning industrial system was one Louis Lochner, who operated a bakery in upstate New York. As was common at the time, his workers labored 12 to 14 hours a day, six or seven days a week, under hot and dangerous conditions much like those encountered in mines and factories everywhere. When the State of New York enacted legislation restricting employment in bakeries to ten hours a day, and 60 hours a week, Lochner brought suit against the State to prevent enforcement of the law in his bakery.

Lochner argued that the law violated "Liberty of Contract," the idea that free men have the right to contract freely among themselves for goods and services without government intervention. This view derived from the day's dominant *laissez faire* philosophy, as articulated by Herbert Spencer. According to this theory, the grimiest puddler in a steel mill was on an equal footing with Andrew Carnegie in making his bargain, and each man exercised the same unfettered right to contract in his own best interests.

The case of *Lochner* v. *New York*[15] reached the Supreme Court in 1905, and the Court again split its vote in a fundamental decision about what the Constitution meant, and how it was to be applied to legislation regulating economic interests. The majority opinion, written by Justice Rufus Peckham, left no doubt about the Court's philosophical underpinnings. Peckham wrote that "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual."[16] Far worse, if such legislation were not struck down the country would be "at the mercy of legislative majorities."[17]

To save the country from that horror it was to be placed at the mercy of Supreme Court majorities, in this case a majority of five-to-four. Rarely, if ever, has the Court been more candid in expressing a condescending elitism than it was in this case.

In tackling *Lochner*, however, the Court still faced a difficult problem. To get rid of the noxious New York law, the Court had to find that its regulations violated some provision of the Constitution. But *what* provision? Nowhere does the Constitution refer to any concept remotely resembling the Liberty of Contract dogma which the Court wished to impose.

What the Court did was to follow the example of the long-dead Chief Justice Taney, and to accept the idea that its own superior social philosophy ought simply to be read into the Constitution. Lacking a constitutional peg on which to hang its virtue, and expressing imaginative genius equal to that of the entrepreneurs it wished to serve, the Court proceeded to invent one.

As Taney had used the due process clause of the Fifth Amendment to justify his stand against congressional prohibition of slavery in the territories, so Peckham used the due process clause of the Fourteenth Amendment to strike down the effort of New York State to regulate the new industrial society. Taney's problem had been action by the federal government, to which the Fifth Amendment applies. Peckham's problem was action by a State, to which the Fourteenth Amendment applies. That Amendment, designed to guarantee the freed slaves citizenship and other civil rights, provides, in Section 1, that, "No State shall . . . deprive any person of life, liberty or property without due process of law." The Fifth Amendment provides a virtually identical guarantee against federal government action.

The concept of "due process of law" had the same meaning in 1866 for the framers of the Fourteenth Amendment that it had had in 1789 for the framers of the Fifth Amendment. Not only was the phrasing nearly identical, but the legal history of due process was well and similarly understood by the framers on both occasions. After the Court's mutilation of it in *Lochner* v. *New York* in 1905, however, the concept was never again the same.

Founding Father Alexander Hamilton had explained clearly and succinctly the meaning of due process of law to the New York Assembly in 1787, as the constitutional convention was about to convene: the words, he said, have "a precise technical effect" and apply only to "the processes and proceedings of the courts of justice." To make his point unmistakable, he added that the concept of due process of law "can never be referred to an act of the legislature."[18] In other words, Hamilton meant that no legislative act would ever be held by the Court to violate due process of law.

In his illuminating book, *Government by Judiciary*, Harvard Law School Professor Raoul Berger asserts that, "No statement to the contrary will be found in any of the constitutional conventions,

in the First Congress, nor in the 1866 debates" which led to the adoption of the Fourteenth Amendment.[19]

In *Lochner*, however, the Supreme Court transformed the concept of due process of law into something which Hamilton, the other framers of the Fifth Amendment, and the authors of the Fourteenth Amendment never remotely conceived that it might become, inventing an expanded interpretation which allowed due process to be used to judge the content of legislation. That newly-invented concept is commonly referred to as "substantive due process," as distinguished from the "procedural due process" concerned with court proceedings.

But the Court was still not home free in the *Lochner* case. It still had to tie Liberty of Contract to its audaciously-created concept of "substantive due process," through which it now claimed the power to examine the validity of state legislation affecting wages, hours, and conditions of employment. To hold such legislation invalid, it still had to find some provision in the Constitution which had been violated. What provision might that be? How, finally, was Liberty of Contract to be attached to the Constitution?

The truth of the matter is that the Court never did make a convincing connection. The majority just said it was so, in a decision which would have made Chief Justice Taney proud. He might even have felt a tinge of envy, having been, by comparison, rather unassuming in his own constitutional indulgence.

Peckham, like Taney before him, had the votes on the Court to make his decision stick, whether anything in the Constitution supported it or not.

During the same years that state-enacted economic and social legislation was being struck down by the Court majority, the Liberty of Contract and "substantive due process" principles were also being applied to similar acts of Congress. To accomplish this, the Court simply changed the meaning of the Fifth Amendment's due process clause in the same manner as it had changed that of the Fourteenth Amendment. Occasionally the Court also employed other constitutional principles to the same purpose. For over three decades, by such devices, the Court stood like the legendary Dutch boy at the dike, refusing to let a single drop of social legislation dampen the dust of the mines or freshen the heat of the mills.

The constraints imposed by the nay-saying Court became ludicrously paralyzing during the Great Depression of the 1930's. Attempting to cope with national economic disaster, President Franklin Roosevelt's New Deal found itself tied up in a judicial straightjacket. Legislation intended to help agriculture and industry was struck down time and time again by the Court on principles derived from *Lochner*. The first Agricultural Act, the National Recovery Act, and many other programs felt the judicial ax. The President and the Congress — the political branches of government charged by the Constitution with the formulation of national policy — were helpless in the face of an economic dogma imposed by the Court without constitutional authority.

By the mid-1930's, criticism of the Supreme Court came to rival the outrage which had followed *Dred Scott* nearly eighty years earlier. Nevertheless, a bare majority of five Justices (the same tenuous margin by which *Dred Scott* had been decided and by which Lochnerism had been fastened onto the Constitution) clung tenaciously to the idea that the country's elected government should not, and could not, regulate the economy.

It was only after Roosevelt's landslide reelection in 1936, and his threat to "pack" the Supreme Court by adding new members, that the Court's strangle-hold was broken. On March 9, 1937, Roosevelt took his case against the Court directly to the people in one of his famous "fireside chats":

The President addressed the nation in terms reminiscent of the excoriating language used by Lincoln against the Taney Court. Roosevelt asserted that the courts had cast doubts on the ability of the elected Congress to protect the nation against economic and social catastrophe through legislation. "We are at a crisis in our ability to proceed with that protection," Roosevelt said, charging that, in blocking economic legislation, "The Court has been acting not as a judicial body, but as a policy-making body." The President drove his indictment home, denouncing "the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people." Rather, Roosevelt accused, "it is perfectly clear, that as Chief Justice Hughes has said: "We are under a Constitution, but the Constitution is what the Judges say it is.'" In his final condemnation, the

President laid his charge exactly on the constitutional violation of which the Court was guilty: "The Court in addition to the proper use of its judicial function has improperly set itself up as a third House of Congress — a super legislature, as one of the Justices has called it — reading into the Constitution words and implications which are not there, and which were never intended to be there."[20]

Finally, seeing the handwriting on the wall, Justice Owen Roberts, one of the five-man majority, abandoned his support for the "substantive due process" position. As a result, the majority shifted, the Court did not have to be "packed" after all, and the political branches of government were freed to deal with the economy under their authorized constitutional powers. As has often been observed since, Justice Robert's "switch in time saved nine."

The judicial usurpation of legislative power by Chief Justice Taney had been a one-shot affair. That of the *Lochner* era lasted for some three decades. In each case public reaction, and a vigorous counterattack on the Court by the political branches of government in order to reclaim their legitimate constitutional functions, had forced the Justices back into their proper places in the constitutional framework. But only for a time. In neither case was the cure permanent because the true cause of judicial encroachment was not addressed. The unbridled power of the Court to legislate whenever a majority so chooses, and to amend the Constitution by judicial *fiat* in order to justify its legislation, has not been subject to effective restraint by any other agency of government.

The more that is understood about the nature of the Court's constitutional transgressions, the more astonishing they become. It is ironic that, just as Taney's sense of racial righteousness led him to the decision which he announced in *Dred Scott* concerning black slavery, equally emphatic (but widely divergent) views of racial morality led successor Courts to equally unsupportable constitutional decisions. We must go back before the turn of the century to pick up this thread of the story.

On a fine day in June of 1892 a man named Plessy attempted to take a ride on the East Louisiana Railway. While his effort got him nowhere on the railway, it did get him into the constitutional Hall of Fame next to Louis Lochner and Dred Scott.

Plessy, a citizen of the United States, bought a first class ticket, got on the train and sat down. The conductor came along and told him to move to "a coach assigned by said company for persons not of the white race." Plessy's racial status, according to the Supreme Court's summary of facts in *Plessy* v. *Ferguson*,[21] was of mixed descent, "in the proportion of seven eighths Caucasian and one eighth African blood." Plessy refused to move, was "forcibly ejected" from the train, and subsequently convicted for having criminally violated an act of the General Assembly of the State. His case, which reached the Supreme Court in 1896, involved another clause of the Fourteenth Amendment, the equal protection clause: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Louisiana statute, which the Supreme Court agreed Plessy had violated, required the State to provide separate but *equal* railway accommodations for the white and colored races. The Court rejected Plessy's argument that this violated the equal protection clause of the Fourteenth Amendment. It found that "in the nature of things" the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social . . . equality, or a commingling of the two races upon terms unsatisfactory to either." It was pointed out, for example, that the "most common instance" of social distinctions was the establishment of separate schools for white and colored children, not only in the various States, but by Congress for the District of Columbia.[22]

We shall demonstrate presently that these conclusions reflected accurately the intent of the framers of the Fourteenth Amendment. They intended that such matters as separation or integration of the races in social or educational contexts be left to the States. There was no intention that the "equality" provided in the Amendment require that the races ride in the same railway cars or attend the same schools. To this extent the *Plessy* decision was sound constitutional law. All the Court had to do, and all it had the constitutional authority to do, was to say that such matters were properly left to the States, and to stop there.

But the Court did not stop there. With all the moral fervor which Roger Taney had injected into *Dred Scott* and which Rufus

Peckham was to inject into *Lochner*, the Court in *Plessy* violated constitutional boundaries to satisfy its appetite for social justice. The Court produced a gratuitous discussion of "equality" which created the gross hypocrisy of "separate but equal," enshrined that hypocrisy as a constitutional principle, and set the stage for one of the most dramatic and disastrous cases ever decided by the Supreme Court, some sixty years later.

It was the opinion of the Court in *Plessy* that if the "colored race" felt the Louisiana law to be a "badge of inferiority," that was so "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[23] It is difficult to believe that the Court's majority could have made such a statement with a straight face. Justice John Marshall Harlan, dissenting in the case, observed that the purpose of the legislation, "under the guise of giving equal accommodation for whites and blacks," was, instead, "to compel the latter to keep to themselves" while travelling in railroad passenger coaches. "No one," he taunted the majority, "would be so wanting in candor as to assert the contrary."[24]

The result of the decision was stultifying. By holding that "separate" facilities might in fact be "equal," the Court invited judges for years to come to find that separate facilities were equal, and so to justify state segregation of the races in all manner of public facilities. The effect of the *Plessy* decision was to focus the question of racial relations upon a false doctrine. What developed as a consequence was a system characterized by a great deal of separation and very little equality.

The turn of the century era in which *Plessy* was decided was one of great social ferment, and substantial social reform. It was the era in which the States, as New York had attempted to do in the regulation of bakeries, introduced a great deal of legislation designed to curb the worst abuses of the new industrial system. Legislative attempts to prohibit child labor, and to adjust wages and other conditions of employment abounded. These reform movements might well have embraced racial relations had the racial question not been frozen into the "separate but equal" dogma spawned by the *Plessy* decision. That dogma was as gratuitous and unnecessary to the disposition of the case in *Plessy* as

Taney's defense of slavery had been to the disposition of the *Dred Scott* case, and was equally without any foundation in the Constitutional provisions upon which it purported to rely.

The Court-induced cancer of "separate but equal" ate away at the body politic until it was at last excised by a successor Court some sixty years later, in a case which launched judicial arrogance to new and breathtaking heights. The case was *Brown* v. *Board of Education of Topeka, Kansas*, decided May 17, 1954.[25]

The issue was racial segregation in the public schools. Topeka, like many other cities and school districts in the country, had provided different schools for black and white pupils, schools which were purportedly "separate but equal." The question before the Court in *Brown* was essentially the same as it had been in *Plessy*, whether the equal protection clause of the Fourteenth Amendment prohibited the States or their political subdivisions, such as school districts, from requiring racial segregation in public facilities. Justice Felix Frankfurter instructed his law clerk, Alexander Bickel, to investigate thoroughly the history of the equal protection clause, and to determine as nearly as he could what the framers of the Amendment had intended.

Bickel studied the origins of the Amendment in the 39th Congress, the climate of opinion in which it was debated and ratified, and what the framers themselves had said about what was intended. His conclusions were unequivocal; he told Frankfurter that "it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting."[26] Bickel concluded specifically that the sponsors of the Fourteenth Amendment did not intend that it should require that children of all citizens attend the same schools. Rather, that was a matter to be left to the determination of the various States. What the framers did intend to protect were such rights as the right to contract, to hold property, to sit on juries, and to be accorded equal treatment before the criminal law.

Frankfurter had Bickel's memorandum printed and circulated to the other members of the Court. Yet, despite the indisputable knowledge of the intent of the framers on such matters as school segregation which the memorandum afforded, the Court held

exactly the opposite. It held that the equal protection clause *did* prohibit segregation in the schools. How did such a decision come about?

Justice Frankfurter attributed the result to divine intervention, and he meant it. As is frequently the case with "miracles," however, the Lord got some help in going about His work; in this case it came from Frankfurter. The *Brown* case was first argued during the October term of 1952, and would normally have been decided in the spring of the following year. Frankfurter listed as probable dissenters, if the separate but equal doctrine were overturned at the time, Chief Justice Vinson, and Justices Clark, Reed, and Jackson. Frankfurter did not want such a case to be decided by a five to four majority, and he succeeded in having it put over to the following term for reargument, hoping that a situation more favorable to his wishes would develop.

After reargument in the fall of 1953, but before the case could be decided, Chief Justice Vinson died. President Dwight Eisenhower — who was later to call it the worst mistake he ever made — appointed Earl Warren to take his place. Frankfurter, as he dressed for the funeral of Chief Justice Vinson, was heard to mutter: "An act of Providence; an act of Providence."[27]

Frankfurter spent many hours with the new Chief Justice discussing the case. Warren subsequently brought to bear all the force of his own personality, and all the power of his office, to persuade those who had been inclined to dissent to vote with the majority. In the end Warren not only succeeded in obtaining a unanimous Court, but he also persuaded the other eight Justices to write no concurring opinions to detract from his own opinion for the Court. Warren's opinion bears careful examination, for it amply demonstrates how far the Court was to wander from both the letter and the intent of the Constitution in the new "Warren era" which *Brown* v. *Board* inaugurated.

The Bickel memorandum had demonstrated conclusively that the framers of the equal protection clause had not intended that it bar segregation in the schools. Yet Warren, in his opinion, declared that the history surrounding the adoption of the Fourteenth Amendment was "inconclusive." This declaration allowed him to ignore the equal protection clause, and to seek elsewhere

for justification of his decision. In so doing, the Court once again amended the Constitution. And again it did so in a manner which ignored, and therefore negated, the troublesome, but legitimate, process for amendment provided in Article V.

Warren asserted that "we cannot turn back the clock to 1868." This is a particularly revealing aspect of his opinion. What was the reading on the "clock" of 1868 to which we supposedly could not return? What does the refusal of the Supreme Court to "turn back the clock" to the time of the adoption of a constitutional provision under consideration mean in constitutional terms? The conclusion seems reasonably inescapable: it means that the Court did not care about the reasons for adoption of the Fourteenth Amendment, or its equal protection clause. The Court was saying that, in its opinion, the intent of the framers of the Amendment, the purpose of Congress in recommending it to the States, and the understanding of the legislatures of three-fourths of the States in adopting it, were all irrelevant. Why? Because the Imperial Court had come to entertain what it considered to be more enlightened opinions on the subject.

The most far-reaching questions posed by this amazing decision are not those discussed in Warren's opinion, but those implicit in his discussion. They are questions which relate to the continued viability of a democratic society, and to the legitimate functions of its constitutionally-authorized institutions. If the Constitution can be changed by the Supreme Court when a majority of its members feel possessed of ideas superior to those written into the document, what meaning is there in a written Constitution? What are the rules by which changes in society signal to the Court that a magical metamorphosis of the Constitution is once more required? Is the Constitution no more than a piece of putty, to be pulled this way by one Court and stretched that way by another? The Court did not choose to address these issues in the *Brown* decision.

Brown was the springboard for an era of judicial invasion of constitutional amending and legislative authority far beyond anything ever imagined, even in the *Lochner* era. Using various "constitutional" inventions similar to those which have been discussed, and with no more constitutional justification, the Court has held that children must be bused miles away from their neighborhoods

to school; that every legislative body in the country except the United States Senate must be reapportioned; that there is a constitutional right to an abortion; that free speech includes pornography; that prayers and Bible reading must be banned from the public schools; and that the guilty must go unpunished where there may be a technical flaw in the gathering of evidence. The Court has imposed upon the country other political and social programs as well.

In effecting these changes in our constitutional system the Court has been described by some of its most enthusiastic supporters as a "Revolutionary Committee."[28] The description is apt, for the decisions of the Warren era carried the Court far beyond the rule of law and the Constitution. In *Lochner*, and even in *Dred Scott*, what the Court did was to exercise a veto power over congressional legislation. These were negative decisions which interdicted and prohibited legislative action. What the Warren Court initiated was an entire legislative program of its own. It came to act as Congress is supposed to act. It initiated policies and set new social programs in motion. That the Court was able to get away with such obvious usurpation demonstrates that there is a fundamental omission in our constitutional system of separation of powers and checks and balances.

The United States Constitution, the oldest formal charter of government in the world today, is a remarkable document. In it the Founding Fathers managed to pull off the difficult trick of providing, at the same time, freedom for the people and adequate power for the government to function. Central to the constitutional scheme is its system of separation of powers, offset by a parallel system of checks and balances. Thus, the executive and legislative branches of government work in cooperation with each other in carrying out certain of their assigned functions. Then there are additional functions of those branches which are set at cross-purposes, in order that one branch may check any tendency towards accumulation of excess power by the other.

The flaw in the system is that the Constitution makes no direct provision for any institution of government to check regularly upon the accumulation of excessive judicial power. The principle of separation of powers was followed — the judiciary is a separate

branch of government — but checks and balances were not provided against the courts in the same manner that they are provided against the executive and the legislature.

The reason for the omission is that the framers of the Constitution wished to avoid the possibility of legislative or executive interference with the necessary independence of the courts. But the basis for this reasoning was an assumption that the courts would continue to operate as they had in the Anglo-American system for centuries. It never occurred to the framers that the courts would ever assume or exercise the kind of legislative and amending power which they have come to claim. Nothing in the whole theory or history of separation of powers would make any sense if it were to be assumed that courts of law could usurp the power of the Congress to legislate, or the power of the people to amend the Constitution. There could be no more clear violation of the principles upon which the Constitution is based.

It is the power of judicial review, the power of the Court to declare null and void any act of federal or state government in conflict with the Constitution, upon which all of the extra-judicial acts of the Court have been based. This is an awesome power to claim for any court, particularly for a court operating within written constitutional limitations on the exercise of power. It is evident that Chief Justice John Marshall recognized this fact when, in 1803, he implanted the power of judicial review in our constitutional system in the case of *Marbury* v. *Madison*. It is clear from his opinion in *Marbury* that Marshall envisioned a limited use of the power of judicial review, and that he, as the founders themselves, never imagined or contemplated anything like the *Lochner* or Warren eras of judicial legislation.

Rather, Marshall intended only that the Supreme Court play the relatively modest role of border policeman, seeing to it that each branch of government stayed within the boundaries assigned to it by the Constitution; and that each observed the requirements of the Constitution in performing its functions. Yet Marshall himself later seemed to sense that he had opened up a gap in the constitutional bulwark against the abuse of governmental power in establishing the Court's power of judicial review, and to fear that he might have created a monster.

Whenever the courts have invaded too deeply into the political arena, legitimate political forces have invariably struck back. We have seen the vitriolic denunciation of the Taney Court by Abraham Lincoln, and the equally vehement condemnation of the waning *Lochner* era by Franklin Roosevelt. Chief Justice Marshall's own Court was involved in the earliest of these political counter-attacks against an invading judiciary.

When Thomas Jefferson and his Republicans were elected in 1800, the outgoing Federalists had sought to offset their political loss by entrenching themselves in the judiciary. Numerous new judgeships were created, and filled by "midnight appointments" of Federalist supporters just before the Jeffersonians took office, a tactic which enraged the victorious Republicans. Although since accepted as legitimate, Marshall's claim for the Court of the power of judicial review in *Marbury* v. *Madison* then added fuel to the fires of Jeffersonian animosity against the Federalist judiciary.

The central thrust in the resulting political counter-attack on the judiciary was an attempt to impeach Supreme Court Justice Samuel Chase. That move failed, and Chase was not removed from the Court. However, it was widely believed that, had the Jeffersonians succeeded, the removal of Chase would have been but the first step in a plan to clear the entire Supreme Court, and perhaps the lower federal courts as well, of their Federalist judges. Accordingly, Marshall himself became genuinely alarmed at the prospects of continued independence for the judiciary. It is a little-known irony of history that Marshall — the man who set the stage for later judicial claims to the legislative and amending powers — also perceived the *remedy* for such excess.

In a letter to Justice Chase at the height of the impeachment proceedings against him, Chief Justice Marshall made a startling suggestion. He proposed that when a judge renders "a legal opinion contrary to the opinion of the legislature," instead of resorting to impeachment and removal of such a judge, "impeachment should *yield to an appellate jurisdiction in the legislature.*" [Emphasis added.] In short, certain Supreme Court decisions should be appealed by *Congress.* Nor did Marshall leave any doubt that he meant what he said. Such a course, he observed, would allow a "reversal of those legal opinions deemed unsound by

the legislature," and "would certainly better comport with the mildness of our character than a removal of the Judge who rendered them unknowing of his fault."[29]

When Marshall's great biographer, Albert J. Beveridge, came across the letter containing this proposal, he could hardly believe it: "Marshall thus suggested the most radical method for correcting judicial decisions ever advanced, before or since, by any man of the first class. Appeals from the Supreme Court to Congress! Senators and Representatives to be the final judges of any judicial decision with which a majority of the House was dissatisfied!" Beveridge could scarcely contain himself. "Had we not the evidence of Marshall's signature to a letter written in his well-known hand, it could not be credited that he ever entertained such sentiments. They were in direct contradiction to his reasoning in *Marbury* v. *Madison*, utterly destructive of the Federalist philosophy of judicial control of legislation."[30] As though to assure himself that he had really read it, Beveridge included a facsimile of the letter in his biography of Marshall.

Beveridge explains Marshall's proposal as arising from his alarm and apprehension at the prospect of a clean sweep of the supreme bench should the impeachment of Chase succeed. There can be no doubt that Marshall was deeply concerned, but the proposal as reported by Beveridge was nevertheless made. It was made *after* Marshall's decision in *Marbury* v. *Madison*, and in a manner which demonstrated beyond doubt that Marshall did not think appellate review in Congress to be unconstitutional. We today, faced with an expansion of judicial review which Marshall never imagined, can surely consider his proposal as a remedy for our present situation.

Marshall's startling — prophetic? — suggestion that ultimate review of judicial decisions should lie in Congress would close the gap in our constitutional defenses against the abuse of power unwittingly left by the Founding Fathers. There could be no more fitting source for this suggestion than the man who fastened the concept of judicial review onto our constitutional framework. Nor is it easy to think of anyone who, having second thoughts about the power of judicial review, might more accurately perceive the abusive uses to which that power could be put.

The history of the Supreme Court since the *Dred Scott* decision calls out for a resurrection of Marshall's suggestion, and for its implementation. Had an appeal to Congress been available, the country would have been spared the agony of the *Dred Scott* decision, and the political process would have had one last chance to avoid the Civil War. Decades of arrogant "Lochnerism" would never have become the dismal history that they were. Legislative social-reform action might well have led to improved treatment of blacks in the absence of the separate-but-equal dogma of *Plessy* v. *Ferguson*. *Brown* v. *Board* would have been a different decision, and the Court's massive usurpation of the legislative and amending power which followed could not conceivably have taken place as it did.

The Supreme Court, and with it the entire court system, federal and state, has gotten itself so hopelessly enmeshed in legislation that the political nature of this situation should be recognized for what it is, and should be *dealt* with politically. There is a fundamental imbalance in our system which requires a fundamental adjustment. The courts have become so addicted to wielding political power that *only* political surgery can cure the disease. Can such surgery on an unwilling patient be accomplished? In fact, there is both constitutional authority and congressional precedent which demonstrates that it can.

Article 3, Section 2 of the Constitution provides that "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make." There is no apparent reason why Congress would not be authorized by this grant of power to give *itself* final appellate jurisdiction in constitutional questions. Such jurisdiction would clearly seem to be one of the "Exceptions" contemplated, and therefore legitimate, under "such Regulations" as Congress shall choose to make. It is evident that Chief Justice Marshall thought Congress had such authority, even *after* he had assumed for the Court the power of judicial review.

Congressional precedent for such action is to be found in the post-Civil War period. In the depths of its disgrace following the *Dred Scott* decision, the Supreme Court had heard argument, in 1868, in a case, *Ex Parte McCardle*,[31] in which it was widely felt

that its decision would be to hold unconstitutional the first Reconstruction Act dealing with the South after the Civil War. To avoid this possibility Congress passed an act withdrawing the jurisdiction of the Court in the type of case at issue. The Act was vetoed by President Andrew Johnson, and repassed over his veto. When *Ex Parte McCardle* was decided, in 1869, the Supreme Court agreed that its authority to render a decision had been abrogated by Congress, and accordingly dismissed the case. Under the principle of *McCardle* it would be possible for Congress to withdraw appellate jurisdiction from the Supreme Court on any subject it might choose. If Congress can withdraw jurisdiction entirely, it surely can subject the same jurisdiction to its own appellate review.

The purpose of such an appeal would not be to subject every facet of the law to legislative review. Instead, the purpose would be functional: to prevent the Court from operating as a legislature, and to prevent it from amending the Constitution of its own accord. Presidential appointments to the Court, history tells us, cannot achieve this purpose. In the long run, all they can assure us is that the Court's legislating and amending will be for very different *reasons*, according to changing Court philosophies.

A number of questions would arise in providing for the appropriate appellate procedure. Should appeal be to one or both houses of Congress? Should it be done separately, or in joint session? Should it be a select committee of one or both houses? Should a special majority be required to hear or determine a case? Other questions would also arise, but so long as the purpose is clearly embodied in the procedure, such a system could work. The purpose is simply to provide for congressional redress when the Court attempts to legislate or to amend the Constitution.

The fascinating irony of this proposition is that, once the Court were outflanked on political issues, it would have nowhere to turn to protect itself except to — the Constitution! By adhering strictly to the wording and the demonstrable intent of the document, the Court could build its strongest case against the use of congressional review, with its admitted possibilities of political interference in the judicial process. By threatening the Court with political review, the Court, in its own self-interest, could be forced *out* of the political activity of legislation, and out of the even more

fundamentally-political activity of constitutional amendment. Legislative review might well be a power rarely, if ever, utilized. Yet it could also be one of the most potent powers of the Constitution, and a major new source for the protection and reinvigoration of that great document itself.

All the hopes for a decent and free existence which rest upon the continued vitality of the American Constitution could be enormously enhanced by completing the constitutional ring of checks and balances. The corruption of power in the Court must be checked as it has been checked in the other branches of government.

An Act of Congress providing for legislative review might, of course, be open to challenge before the Court itself on constitutional grounds. That would put the Court in a most interesting position. Were it to declare such a law unconstitutional, it would have to rely upon grounds which are not apparent in the Constitution, and which were not apparent to the unanimous Court which decided *Ex Parte McCardle*. It is not hard to imagine the scrutiny to which such a decision would be subject. Were the Court to defy Congress, the stage would be set for a constitutional debate of the first order.

Bold action by the Congress to follow the suggestion of Chief Justice Marshall would allow the country to choose openly and cleanly between judicial "legislators" who are appointed for life and responsible to no one, and congressional legislators elected according to the processes provided for in the Constitution. We, the people, could decide whether to ratify and rejuvenate the constitutional structure agreed upon in 1789, or to remain subject to the political and social eccentricities of an authoritarian superlegislature now beyond our control.

NOTES

1. *Roe* v. *Wade*, 410 U.S. 113 (1973).
2. *Griswold* v. *Connecticut*, 381 U.S. 479 (1964).
3. *Ibid.*, p. 484.
4. *Roe* v. *Wade*, p. 153.
5. John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," *Yale Law Journal*, vol. 82, 1973, p. 947.
6. *Dred Scott* v. *Sanford*, 60 U.S. 393 (1875), 15 Law. Ed. 691, 700-701.
7. *Ibid.*, p. 703.

8. *Marbury* v. *Madison*, 1 Cranch 137 (1803).
9. Raoul Berger, *Government by Judiciary*, Harvard Univ. Press, 1977, p. 222, n. 4.
10. *Ibid.*, p. 222.
11. Wallace Mendelson, "The Politics of Judicial Activism," *Emory Law Journal*, vol. 24, 1975, pp. 48-49.
12. Berger, *op. cit.*, p. 415, n. 25.
13. Carl Brent Swisher, *American Constitutional Development*, Houghton Mifflin Co., 1943, p. 519.
14. *Ibid.*, p. 251.
15 *Lochner* v. *New York*, 198 U.S. 45 (1905).
16 *Ibid.*, p. 61.
17 *Ibid.*, p. 59.
18. Berger, *op. cit.*, p. 194.
19. *Ibid.*
20. Theodore L. Becker and Malcolm M. Feeley, (Eds), *The Impact of Supreme Court Decisions*, Oxford Univ. Press, 1973, pp. 39-41.
21. *Plessy* v. *Ferguson*, 163 U.S. 537, 538-539 (1896).
22. *Ibid.*, p. 544.
23. *Ibid.*, p. 551.
24. *Ibid.*, p. 557.
25. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).
26. Berger, *op. cit.*, p. 118.
27. *Ibid.*, p. 129, n. 47.
28. Mendelson, *op. cit.*, p. 60. The author quotes Robert M. Hutchins as calling the Supreme Court "the highest legislative body in the land."
29. Albert J. Beveridge, *The Life of John Marshall*, (4 vol.), Houghton Mifflin Co., 1919, vol. III, p. 177.
30. *Ibid.*, p. 178.
31. *Ex Parte McCardle*, 7 Wall. 506 (1869).

Raw Judicial Power

John T. Noonan Jr.

ON JANUARY 22, 1973, the Supreme Court of the United States deciding *Roe* v. *Wade* and *Doe* v. *Bolton* announced that a new personal liberty existed in the Constitution — the liberty of a woman to procure the termination of her pregnancy at any time in its course. The Court was not sure where the Constitution had mentioned this right, although the Court was clear that the Constitution had not mentioned it explicitly. "We feel," said Justice Blackmun for the majority, "that the right is located in the Fourteenth Amendment's concept of personal liberty," but he thought that it also could be placed "in the Ninth Amendment's reservation of rights to the people" (*Wade*, pp. 37-38). Vague as to the exact constitutional provision, the Court was sure of its power to proclaim an exact constitutional mandate. It propounded a doctrine on human life which had, until then, escaped the notice of the Congress of the United States and the legislators of all fifty states. It set out criteria it said were required by the Constitution which made invalid the regulation of abortion in every state in the Union, the District of Columbia, the Commonwealth of Puerto Rico, and the City of New York. No one of these bodies had read the Constitution right.

Wherever the liberty came from in the Constitution and however recent its discovery was, it was of a very high rank. It deserved to be classified as "fundamental" and as "implicit in the concept of ordered liberty" (*Wade*, p. 37). With these characterizations, the right took its place with such foundations of civilized society as the requirement of fair, public trials. Justice Blackmun seemed to sense no incongruity in giving so basic a position to a demand which had, until his opinion, been consistently and unanimously

---

John T. Noonan, Jr. is the author of *A Private Choice: Abortion in America in the Seventies* (The Free Press, Macmillan, 1979). This article first appeared in the March 2, 1973 issue of *National Review* (i.e., just weeks after the Supreme Court's legalization of abortion) and is reprinted here without alteration, with permission (© 1973, National Review Inc.).

rejected by the people of the United States. He did not pause to wonder how the nation had survived before January 22, 1973 in steadfastly repudiating a right implied in the concept of ordered liberty.

Some of the legislation affected was old, going back to the mid-nineteenth century, some was recent, reflecting the wisdom of the American Law Institute or containing explicit statements of intent to protect the fetus. Some of the legislation had been confirmed by recent popular referenda, as in Michigan and North Dakota; some of the legislation was in the process of repeal, as in New York. Old or new, compromise or complete protection from conception, passed by nineteenth-century males or confirmed by popular vote of both sexes, maintained by apathy or reaffirmed in vigorous democratic battle, none of the existing legislation on abortion conformed to the Court's criteria. By this basic fact alone, *Roe* v. *Wade* and *Doe* v. *Bolton* may stand as the most radical decisions ever issued by the Supreme Court.

That these opinions come from a Court substantially dominated by appointees of a President dedicated to strict construction of the Constitution, that they should be drafted by a Justice whose antecedents are Republican, are ironies which do not abate the revolutionary character of what the Court has done in the exercise of what Justice White, in dissent, calls "raw judicial power." In rhetoric, the style is that of a judicial body. In substance, the opinions could have been authored by Paul Ehrlich or Bella Abzug.

Radicalism marks not only the Court's treatment of the states and its preference for the views of an elite to the results of democratic contests. Radicalism is also the mark of the Court's results. In October 1963 Glanville Williams, the spiritual father of abortion-on-demand, put the proposition to the Abortion Law Reform Association that abortion be made a matter between woman and physician up to the end of the third month. His proposal was voted down by the then most organized advocates of abortion. In less than ten years the Supreme Court has written into the Constitution a far more radical doctrine. By virtue of its opinions, human life has less protection in the United States today than at any time since the inception of the country. By virtue of its

opinions, human life has less protection in the United States than in any country of the Western world.

The Court's Holdings

Did the Court really go so far? Here is what it held:

1. Until a human being is "viable" or "capable of meaningful life," a state has no "compelling interest" which justifies it in restricting in any way in favor of the fetus a woman's fundamental personal liberty of abortion (*Wade,* p. 48). For six months, or "usually" for seven months (the Court's reckoning, p. 45), the fetus is denied the protection of law by virtue of either the Ninth Amendment or the Fourteenth Amendment.

2. After viability has been reached, the human being is not a person "in the whole sense," so that even after viability he or she is not protected by the Fourteenth Amendment's guarantee that life shall not be taken without due process of law (*Wade*, p. 47). At this point he or she is, however, legally recognizable as "potential life" (*Wade*, p. 48).

3. A state may nonetheless not protect a viable human being by preventing an abortion undertaken to preserve the health of the mother (*Wade*, p. 48). Therefore a fetus of seven, eight, or nine months is subordinated by the Constitution to the demand for abortion predicated on health.

4. What the health of a mother requires in any particular case is a medical judgment to be "exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient" (*Bolton*, pp. 11-12).

5. The state may require that all abortions be done by licensed physicians, that after the first trimester they be performed in licensed "facilities," and that after viability they be regulated so long as "health" abortions are not denied (*Wade*, p. 49). The state is constitutionally barred, however, from requiring review of the abortion decision by a hospital committee or concurrence in the decision by two physicians other than the attending physician (*Bolton*, p. 17, p. 19). The Constitution also prohibits a state from requiring that the abortion be in a hospital licensed by the Joint Committee on Accreditation of Hospitals or indeed that it be in a hospital at all (*Bolton*, pp. 14-15).

With belated misgivings, Chief Justice Burger concludes his brief concurrence in Justice Blackmun's opinion with the sentence: "Plainly, the Court today rejects any claim that the Constitution requires abortion-on-demand." Here is a desperate effort to recapture in a sentence what the Court has given away in its list of criteria mandated by the Constitution. Plainly, there cannot be the slightest argument that for the first six to seven months of fetal existence, the Court has made abortion-on-demand a constitutional right. Opposed to the mother's "fundamental personal liberty," the embryo or fetus is valued at precisely zero. His or her very existence seems to be doubted by the Court which refers to the state's interest here not as an interest in actual lives but as an interest in a "theory of life" (*Wade*, p. 47). The woman's right is treated as an absolute, abridgeable only for her own sake by the requirements as to licensed physicians and facilities.

Abortion-on-demand after the first six or seven months of fetal existence has been effected by the Court through its denial of personhood to the viable fetus, on the one hand, and through its broad definition of health, on the other. Because the seven-month-old fetus is not a person — cannot be a person as long as it is a fetus — because it now bears the label "potential life," the fetus is not a patient whose interest the physician must consult. In the Court's scheme, the physician has one person as patient, the mother.

When the doctor considers the mother's health, he is to think in terms of the extensive definition of health first popularized by the World Health Organization (WHO). According to the WHO declaration, health is "a state of complete physical, mental, and social well-being, not simply the absence of illness and disease." The Supreme Court now affixes a seal of approval to this definition, substituting "familial" for "social," but essentially equating health with well-being. What physician could now be shown to have performed an abortion, at any time in the pregnancy, which was not intended to be for the well-being of the mother? What person would have difficulty in finding a physician who, in full compliance with the Court's criteria, could advise an abortion if the patient's emotional demand was intense enough? Never before in British or American law has a baby in the last stages of pregnancy

been so exposed to destruction at the desire of the parent.

The Court's Reasoning

How did this Supreme Court reach this extraordinary result? In part through an inept use of history, in part through a schizophrenic style of judicial interpretation, in part through a conscious response to the needs of technocracy.

Let us look at the history. Justice Blackmun's opinion in *Wade* contains a copious gob of it (*Wade*, pp. 14-36). By and large it is a conscientious if pedestrian review of the relevant literature. But it is a history that is undigested — better said, it is history that has been untasted. It has afforded no nourishment to the mind of the judge who set it out. He has not let it engage his spirit. He has not felt the pressure of loyalty to the persons of the past who have shaped our culture. He has not responded as a person to their perceptions.

Justice Blackmun describes with clarity the reason the American Medical Association led the fight in the nineteenth century for statutory protection of the embryo — "the popular ignorance of the true character of the crime — a belief, even among mothers themselves that the fetus is not alive till after the period of quickening"; the consequent "unwarrantable destruction of human life" before the fifth month. He concludes, "The attitude of the profession may have played a significant role in the enactment of stringent abortion legislation during that period" (*Wade*, pp. 26-27). But the unimpeachable facts are apparently forgotten when Justice Blackmun discusses the claim that the purpose of American statutory law was not to protect the fetus, but to protect the mother from sepsis or other risks attendant on abdominal surgery in the unsanitary hospitals of the day. The Justice does not ask why the statutes then bar abortion by drug, or why this kind of surgery alone should have been made subject to the criminal law and customarily classed among "Crimes against the Person."

If Justice Blackmun can read the history, cite the American Medical Association jeremiads, and trace the development of the law, and yet be uncertain as to the law's intent, it must be that he has failed to grasp, failed to integrate, the purposes which animated our ancestors in laying down a thick wall of protection

about the baby in the womb. History for him has not been the evocation of persons in fidelity to their fundamental purposes. It has been a charade which is shuffled off the stage when the display of learning is completed.

What of the schizoid style of judicial interpretation favored by the Justice? On the one hand, he declares the Fourteenth Amendment, enacted in 1868, refers to a personal liberty which had escaped attention for over a century — a liberty which, as Justice Rehnquist observes in dissent, would, if noticed, have invalidated the state statutes on abortion in force in 1868. Needless to say, not a single word of history is adduced to show that the framers of the Fourteenth Amendment, the Congress which proposed it and the states which passed it, intended to legitimize abortion. In this branch of his opinion, Justice Blackmun is an evolutionist. Constitutions must be re-interpreted or remade to speak to the times. If liberty means one thing in 1868 and something entirely different in 1973, it is what one must expect of a basic document exposed to a variety of times and conditions. As Justice Blackmun says in an oblique reference to the process which he has followed, his holding is consistent "with the demands of the profound problems of the present day" (*Wade*, p. 50).

On the other hand, in determining the meaning of "person" in the Fourteenth Amendment's guarantee, the Justice is curiously wooden. He looks at what person meant literally at the time of the adoption of the Constitution. He notes what person must have meant in other clauses of the document. He observes that fetuses are not enumerated in the census. But he does not ask if the new biological data on the fetus compels the Court to be as evolutionary in its definition of person as it is in its definition of liberty. He refrains from looking squarely at the facts of fetal existence. He takes the term person as if its meaning had been frozen forever. Contrary to the radical substance of the rest of his opinion, he is here, uniquely, a strict constructionist.

Neither the use of history nor the method of construing the Constitution explains why the Court reached the result it did; and the Court has been so curiously circumspect about revealing its reasoning that a commentator is forced to fall back on hints and to resort to inferences. Four features of the opinions are suggestive:

1. Justice Blackmun in an excusatory preamble states that he is aware of "the sensitive emotional nature of the abortion controversy" and concludes with an admonition from Holmes that judges should not brand a statute unconstitutional merely because it embodies opinions which to them are "novel and even shocking" (*Wade*, pp. 1-2). Would it be rash to suppose that Justice Blackmun saw the appropriateness of this advice, even as he did not follow it, when he encountered the opinion that a fetus is a person? To one vocal segment of American thought, few things could be so novel or shocking as the suggestion that a fetus has human rights. If Justice Blackmun accepted the viewpoint dominant in the media, he could readily have been shocked at the postulates underlying the statutes on abortion.

2. "Population growth, pollution, poverty, and racial overtones" are mentioned by name only on page one of *Wade* as matters "tending to complicate the problem." They then disappear from view only to be embraced in the vague but comprehensive self-justification of the Court's holding: It is "consistent with" the "demands of the profound problems of the present day" (*Wade*, p. 50). Studiously ignored is the recommendation of the Rockefeller Commission that abortion be used as a secondary form of population control. Studiously ignored is the comment of black leaders like Jesse Jackson that what is being prepared by the welfare bureaucrats is a program of genocide in the womb. And yet the Court, looking back as it were on its handiwork, says its holding responds to profound problems of the present. What problems fall within the Court's solution but the problems of controlling population growth, the problems of the welfare bureaucracy curtailing welfare rolls?

3. The Court declares that if those trained in medicine, philosophy, and theology are unable to arrive at a consensus as to when life begins, then "the judiciary is not in a position to speculate as to the answer" (*Wade*, p. 44). Incompetence in the area is avowed.

Three pages later, Justice Blackmun describes the abortion statute of Texas as "adopting one theory of life" and rejects that theory as a ground for regulating abortion. Is this the judiciary "speculating as to the answer" or is it not? How can Texas — and the other states with comparable statutes — be wrong in protecting

fetal life against arbitrary extinction unless the majority of the Court knows better when life begins? The pretense of incompetence seems to be humbug.

Beneath the avowal of incompetence is a commitment to a particular theology or theory of human life. Life is an interest worthy of state protection when it acquires the characteristic of "viability" or "the capability of meaningful life outside the mother's womb." At this point, state protection has "both logical and biological justification" (*Wade*, p. 48). At this point, in short, life has characteristics that other humans may recognize. At this point, functionally, the Justice says human life begins.

As both a logical and biological matter, however, viability depends entirely on the relation of a human being's capacities to the environment in which he or she is placed. As André Hellegers has pointed out, an adult stripped naked and placed on the North Pole suddenly becomes nonviable. Analogously, a fetus ripped from his mother's womb suffers a sudden loss of the capability to survive. In the environment in which he or she had been existing, however, the fetus was as viable as any of us in our houses.

Neither logic nor biology seems to help in explaining why Justice Blackmun chose the point in the continuum he picked for recognition. But he has thrown out another phrase for our guidance — "capability of meaningful life." Here, it may be, lies the heart of the matter. What it is appropriate for the state to protect is not a human being, but a human being with the "capability of meaningful life." Human life is defined in terms of this capability. Qualitative standards of the life worthy of protection are to prevail, as Joseph Fletcher is reported to have joyously greeted the decision. Our old way of looking on all human existence as sacred is to be replaced by a new ethic more discriminating in choosing who shall live and who shall die. The concept of "meaningful life" is at the core of these decisions.

4. Who shall make the judgment that life has meaning or the capability of meaning? On this key point, it is not, perhaps, unfair to suspect Justice Blackmun of being an elitist, or, if one prefers, a technocrat.

The twin opinions breathe an extraordinary respect for the medical profession. Their explicit presupposition is that a "conscien-

tious physician" using his best professional judgment — not "degraded" by having his judgment reviewed by colleagues *(Bolton*, p. 16) — will determine whether the fetus shall live or die. Turning the community's protection of human life over to the judgment of the technician who will perform the operation, Justice Blackmun goes as far as one judge could go to bring about the technocratic utopia so wittily and so unsparingly described in *Brave New World.*

A large irony of the opinions is this: The Fourteenth Amendment, made necessary by an earlier Supreme Court's attempt to make it legally impossible to protect the personal rights of a free black, is here made the source of holdings which made it legally impossible to protect the personal rights of a fetus. Forever denied the status of person "in the whole sense of the term," forever subordinated to the psychological health of his mother, the baby in the womb has been deprived of the possibility of protection by state or federal law. It would be a waste of valuable energy to exert any effort at amending the abortion laws to achieve in the last two or three months of fetal life the uncertain protection which the Court does not outlaw.

A second major irony is that the Court's alternative authority for the right to abort is the Ninth Amendment. This Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The people had already spoken on abortion through the legislatures of fifty states. In Michigan and North Dakota, crushing majorities of the people had, as recently as November 1972, rejected the demand that abortion be allowed on five-month-old fetuses. Who would contend that what Justice Blackmun and his six colleagues legislated could be passed as law in Congress or in any popular referendum? How could the rights of the people be more effectively "disparaged" by an elite than for seven members of a court to pronounce their efforts at controlling assaults on life to be unconstitutional?

These ironies suggest that the solution must be drastic. A majority which will mock the people with the doctrines of technocratic elitism will not stay its hand if confronted with new legislation not conforming to its sovereign mandate. The root of the problem

must be reached. Two lines of attack are possible. They could be pursued concurrently:

First. The Court could be expanded from nine to 15. This solution could be labeled "The Abraham Lincoln Solution." It is the idea he put forward in the famous Lincoln-Douglas debates, when Douglas insisted that *Dred Scott* was the law of the land. Douglas, he observed, had been one of five new judges added to the Supreme Court of Illinois, "to break down the four old ones." Was not, he implied, a change in membership in the Court a constitutional way of correcting a bad decision?

In many minds sensitive to the Court's place in our institutional structure there must be reluctance to change the traditional number in response to a particular decision. The "court-packing" plan of Franklin D. Roosevelt and the strong opposition it engendered come to mind. Nonetheless, there is reason why an expansion of the Court may be considered at this time as more than an ad hoc answer to a decision. A committee appointed by the Chief Justice himself (the "Freund Committee") has proposed that the Court be relieved of many of its burdens by the creation of a national appellate body which would decide what cases are appropriate for adjudication by the Supreme Court itself. The plain implication of the proposal is that nine justices are far too few to handle the enormous modern increase in the Court's business. Expansion of the Court to 15 would meet this problem directly without the disadvantage of bifurcating the functions of the highest tribunal. Expansion can be rationally justified as a functional necessity at the same time that it affords a vehicle for restoring the rights of the people.

Expansion has a practical basis. Its political attractiveness does not need underlining. It is, still, however a temporary response. It does not meet the moral issue at its deepest level. It does not provide constitutional protection for human life in the future.

The second possible course, then, is to follow the approach actually taken to overturn *Dred Scott*: Amend the Constitution. Under *Wade* and *Bolton* the fetus can never be a person within the Fourteenth Amendment, the people can never vote to give effective protection to the fetus. Very well, let the people defend the fetus by a new amendment.

The people might go further. They might defend not only humans in the womb, but all nonviable humans — all humans threatened with possible classification as being lacking the "capability of meaningful life." The infant suffering from genetic deficiencies, the retarded child, the insane or senile adult — all of these potential victims of a "quality of life" mystique could be defended by a Human Life Amendment to our Constitution.

APPENDIX A

[*What follows is taken from the book* Congress and the American Tradition *(Henry Regnery Co., Chicago, 1965) by James Burnham, a writer and seminal thinker whose original* The Managerial Revolution *gained international fame. This analysis of the powers of the Supreme Court is excerpted from "The Traditional Balance" (Chapter 8), and is reprinted here (with the deletion of a single outdated footnote) with permission of the author and the Regnery/Gateway Co., Chicago.*]

Two Fallacies

James Burnham

The frequency of Supreme Court decisions declaring acts of Congress unconstitutional, and therefore null, follows a curve rather similar to that of the presidential vetoes, though — because of the mode of appointment of judges — lagging somewhat behind. Prior to the Civil War there were only two such decisions. There were another twenty through to the end of the 19th century. During the first four decades of the 20th century they came noticeably oftener — forty-nine in all.[1] After 1940, as the judiciary came under the influence of the same political forces that had earlier taken over the executive branch and the bureaucracy, these judicial vetoes, like the presidential, became more or less routine.

The idea, widespread today, that in the American system the Supreme Court is the ultimate and only constitutional arbiter, so that the system is actually one of "judicial supremacy," is no more borne out in American tradition than in the written propositions of the Constitution itself. "From 1803 to 1930 the Supreme Court nullified acts of Congress in some sixty cases, but less than a dozen of these were of major importance and few, if any, of them imposed lasting limits on the law-making power of Congress."[2]

A due estimate of the role of the judiciary in the American constitutional system is often obscured by two fallacies. One of these involves the meaning of "finality of judgment." With respect to the decision on a particular case at issue that falls within its jurisdiction, the Supreme Court has always insisted[3] that its determination is "final" and not subject to review by any other court or by the legislature. This finality, it is held, appertains to the nature of "judicial power." But finality with respect to a particular case[4] is quite different from finality with respect to a general rule or principle: that is, a law. The Court, when rendering a decision about the particular case before it often does, of course, have something to say (in what are called *obiter dicta*) about the rules, principles and laws. But

neither in theory nor in historic fact does the finality of the particular decision carry over automatically to the *obiter dicta* — however earnestly some judges may believe so.

There is a second fallacy — of "verbal fetishism" — whereby the verbal order is mistakenly thought to correspond exactly to the temporal and casual order of real events. Often, at any given stage of constitutional development, the Court pronounces "the final word" on a law. That is to say, the Court gives explicit, systematic verbal form to an operative interpretation of a statute or common law principle. This does not necessarily mean (though it might mean) that the Court has "made" the law or been active in changing its substance. The Court may be (and usually is) only recording, giving verbal form, to changes that have been caused in primary part by the legislature, the executive and perhaps by still other social institutions. A Town Crier was not supreme over the Mayor just because he had the last word in telling the citizens what must be done, nor does a ghost writer necessarily run a corporation because he writes the president's speeches. The process of judicial determination is, certainly, more creative than the Town Crier's mere passive repetition, and no doubt more active in substance than the usual ghost writer's verbal exercise. And sometimes, we know, the Court does make law, even on a massive scale. But without further examination we cannot assume that in the case of laws and principles the "finality" of the Court's words means anything more than "latest in time." In a totalitarian state also, the courts, as a rule, speak the final word, but no one will argue that we can deduce therefrom that in Nazi Germany or communist Russia there is judicial supremacy.

Montesquieu, Hamilton and Madison were correct in their observation that the judiciary, on its own independent resources, must inevitably be "the weakest of the three departments of power." Chief Justice Marshall repeated the same conclusion, essentially, when he declared in 1824: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts . . . can will nothing." And Justice Owen Roberts echoed in 1936: "All the court does, can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment."

And is this not really obvious? The act of a court (including its pronouncement of *obiter dicta*) is a judgment, and this judgment can be rendered only on an individual complaint that is brought — after the event — before it. The court cannot directly compel anyone to initiate the complaint or to accept its findings. Police and army — the means of coercion — are under command of the executive, not the judiciary. The courts

cannot even assure the material conditions of their own existence: the taxing and appropriating powers belong to the legislature.

The judiciary can gain (or seem to gain) preponderate power only with the support or compliance of the other two branches, only in what might nowadays be called "a united front" with one or both of them. In the long run, as American history abundantly proves, the judiciary must inevitably lose in a direct conflict with the executive and the legislature — if, it should be added, they choose to fight.

The judiciary has sometimes been able to delay, but it has never permanently blocked the other two branches in a course upon which both of them are determined and for which they have the backing of the electorate; nor on the few occasions when it has been tried has the judiciary been able, in any major matter, to coerce the two sister branches into a line of action that both of them opposed. John Marshall could pronounce his finding that Congress possessed all the implied powers, but this meant little while Congress was under the control of Jeffersonian legislators who were not disposed to exercise implied powers. Chief Justice Taney could deduce a judicial solution of the problems of slavery and States' Rights; but the Dred Scott decision in which he announced it, accepted by neither President nor Congress nor the states, faded away without ever having entered into the active life of the nation.

The Constitution, as we have noted, provides for only the barest minimum of the American judicial system, with all else left for Congress to determine. The Constitution decrees "one supreme Court" (its composition unspecified), but only "such inferior Courts as the Congress may from time to time ordain and establish." These inferior courts — their numbers, kinds, jurisdiction, funds, duties, rules, their powers to issue writs and injunctions and orders — exist only by virtue of congressional statutes that begin with the basic Judiciary Act passed by the first session of the first Congress.

Although the Supreme Court does exist by constitutional, not statutory fiat, it is not exempt from congressional restriction and control. The number of its members, its budget, even where and when it meets, are subject to the legislative will. The Constitution assigns it original jurisdiction only in "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." In other federal cases, the Supreme Court holds appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."

In 1849 the Supreme Court ordered the Wheeling & Belmont Bridge Co. to destroy its bridge over the Ohio River as an "unlawful" obstruction to

navigation. The company, disregarding the decision and a subsequent injunction, turned to Congress, which in 1852 passed a statute declaring the bridge to be "a lawful structure." The Court, accepting, noted that although the bridge "may still be an obstruction in fact, it is not so in the contemplation of law."

In 1868, when *Ex parte McCardle* — an action that implied a challenge to the constitutionality of the Reconstruction Acts — was actually before the Court, Congress passed (over President Johnson's veto) a rider repealing the Supreme Court's jurisdiction in all cases arising out of the relevant statute. The Court then dismissed the case. Under Franklin Roosevelt, the workings of the wartime Price Control Act were similarly exempted from Supreme Court scrutiny.

In conflicts with the Supreme Court, Congress has often threatened to use, and has a number of times actually used its power to alter the number of Justices. Under the original Judiciary Act there were six Justices of the Supreme Court. As episodes in the Jeffersonians' struggle to control the judiciary, Congress changed the number to five in 1801, then back to six in 1802. The number was raised to nine in 1837 (to water down the influence of John Marshall), and to ten in 1863 (to give the North a safer majority); dropped to seven in 1866 (to prevent Andrew Johnson from making any appointments), and voted back to nine in 1869, when Grant could name the new members — who, as expected, brought a reversal of the Court's previous finding against the Legal Tender Act. There was thus substantial precedents for Franklin Roosevelt's "Court packing" proposal. Though this last was never adopted by Congress, its threat, combined with Roosevelt's manipulation of public opinion and Willis Van Devanter's forced resignation, brought the Court around to acceptance of the New Deal measures.

The Court can always be corrected by amending the Constitution, a process in which it has no role. Amendments XI, XIV and XVI were, in fact, specifically designed to overrule Supreme Court decisions. Impeachment — within the sole power of Congress — is also always a formal possibility, although it has not been attempted for Supreme Court Justices since the Jeffersonians failed against Salmon Chase. Still, even the latent possibility of impeachment serves as a psychological curb on the judiciary.

Let us also note that the Justices do not grow Topsylike from the Bench. They are selected by the Chief Executive and confirmed by one House of the legislature. Though the Justices, like other men, can change through the years, and though because of their permanent appointment they run no risk from changing, they and their Court usually reflect the basic opinions and values of those who have chosen them.

By these observations I do not intend to dismiss as negligible the tradi-

tional share of the Court in the complex whole of American sovereignty, nor to deny that this share proved to be considerably larger than was conceived by the Philadelphia Convention. I wish merely to moderate the exaggerated theory of "judicial supremacy" which, by an overly formalistic reading of the record, sees the Court as the major or even majority partner in the national directorate. Under the American system the Court does undoubtedly hold an autonomous share in the nation's power, a bigger share than that of the judiciary in most other nations; but neither the intentions of the Fathers, the provisions of the Constitution, nor the actual history of the nation's political development confirm the theory of the Court's preponderance.

Even in the narrower field of "constitutional interpretation" it is not true that the Court has had the sole and final word. Faced with a striking decision that goes counter to their own conviction on an issue that much concerns them, political analysts fall back on the aphorism: "The Constitution means what the Supreme Court says it means." Like most aphorisms this one is inexact and over-simplified. The Constitution means in the first instance its own explicit words, the intent of which is in some considerable measure unchallengeable and unchallenged. And it means, in gloss on that source, what the Congress and President, and also the states and public opinion, say it means, as well as what the Court says. We find here as throughout the American system an actual resultant that obtains from the dynamic clash and balancing of divided and autonomous powers.

The Presidency, from Washington's first day in office, and Congress, from the first action of the first session of the first Congress, have been interpreting and applying the Constitution. We have already observed that the executive veto power has always been understood, and sometimes exclusively, as a negative device for protecting the integrity of the Constitution. No important debate in Congress neglects the constitutional bearing of the questions at issue. For every statute that the Supreme Court has nullified on constitutional grounds, a score have, on the same grounds, failed of congressional enactment. There are many more words, and as cogent words, of constitutional analysis in the journals of Congress as in the opinions of the Court; and there are not a few, also, in the messages of the Presidents.

Throughout the 19th century the great constitutional debates raged, and for the most part were acted on, in the halls of Congress, not in the courts. The judiciary seldom intervened, and then never decisively, in the supreme issues of slavery and union. In the development of the meaning of the commerce clause, the war powers, and regulatory functions, the role of the judiciary, though real, was by the nature of the case secondary; the initiative, the historical as distinguished from the formal decisions, could only come, generally speaking, from the President or the Congress.

In the present century, undoubtedly, the Court has enlarged its share in the power. By its more frequent decisions nullifying congressional acts or creating new laws under the guise of interpreting the old, the Court has shown more openly what has always been true: that in the American system the highest court is not a merely judicial bench but one among the integral "political departments." But even in its boldest encroachments, the Court has not been able to overleap the all but inevitable limits of the judicial function. The court cannot indefinately prevail against the united view of executive, legislature and public opinion. Certainly up through 1933 (to which period our conclusions are still restricted), "judicial supremacy"[5] was more a polemical metaphor than a historical description of the American system.

Traditionally the American governmental system has been in fact what it has been customarily said to be: a changing equilibrium of dispersed, balancing and conflicting powers. If within that system any one of the diverse elements has traditionally been, on the whole, of relatively more weight than the others, it is, as the formal scheme of the Constitution plainly suggests, the legislature, the Congress. If we have had — or have — any sort of special supremacy, then it has been a congressional supremacy.

NOTES

1. These figures are from *The Constitution of the United States of America.*
2. Galloway, *The Legislative Process in Congress*, p. 464.
3. Explicitly so insisted from the first occasion — Hayburn's case, 1972/3 — in which the problem was raised.
4. Even the finality with respect to a particular case is in the American system subject to the pardoning power of the executive, and the power of the legislature to indemnify damages assessed through the judicial process.
5. The idea of "judicial supremacy" was first popularized around the turn of the century by Marxist and semi-Marxist historians who viewed and attacked the Court as the most reactionary influence in American society. Cf., for example, Gustavus Myers, *History of the Supreme Court of the United States*, and Charles A. Beard, *The Supreme Court and the Constitution.*

APPENDIX B

[*What follows first appeared in* The Public Interest, *a well-known quarterly dealing with social and political affairs. The author is Robert H. Bork, formerly Solicitor General of the U.S., and generally considered a leading constitutional scholar; it is his "preface" to a review of the book on the late Supreme Court Justice, Felix Frankfurter. It is reprinted here with permission of the author and* The Public Interest *(©1981, National Affairs, Inc., New York, N.Y.)*].

The performance of the Supreme Court is once more a national political issue. Among socially conservative groups, intense dissatisfaction with the Court's rulings on abortion, busing, and school prayer have triggered legislative proposals. Some bills would deprive the Court of appellate jurisdiction over these subjects; another would modify by statute the result of the abortion decision, *Roe* v. *Wade*. Scholarly opinion is sharply divided about the constitutionality and propriety of these responses. On the one hand, it seems clear to many, not just the constituencies against abortion and busing, that the Court is adrift and frequently performing not a constitutional but a legislative function. On the other hand, it is not clear to all of those same observers that the situation is so irretrievable that remedies should be applied which, in principle, threaten the entire concept of judicial supremacy in applying the Constitution. Anger, particularly about the abortion decision, is so great, however, that there is a chance some legislation of this sort will be enacted. It is entirely conceivable that we are headed for a constitutional crisis, a confrontation between the democratic and judicial branches of government.

It is well to remember both that the Court has frequently stirred political anger — Thomas Jefferson and Franklin Roosevelt made serious assaults upon the judiciary's independence — and that this historical fact by no means justifies the Court's performance or lessens the legitimacy and seriousness of today's political counter-moves. The real problem is that there exist almost no useable mechanisms by which the Court can be kept within constitutional bounds. Use of the Exceptions Clause of Article III of the Constitution to remove appellate jurisdiction, plus a simultaneous removal of jurisdiction from the lower federal courts, would not return power either to Congress or to state legislatures but to state courts. The result would not be a restoration of democratic government to subjects over which it rightly claims dominion, but, rather, continued judicial government by fifty state systems. There could be no hope of

uniformity. Amending the Constitution is not a general solution to judicial expressionism; there are too many serious judicial excesses to make amendments a feasible tool of correction. The problem is that the framers of the Constitution, while they foresaw that the Court would review laws for constitutionality, did not remotely foresee what that power was capable of becoming, and provided no institutional check, no safeguard, against a judiciary that expanded its powers far beyond the allowable meaning of the Constitution. The only safeguard we have at the moment is the self-discipline and capacity for self-denial of our judges. That, to put it mildly, has not always proved adequate.

APPENDIX C

[We reprint here — for the third time in this journal (it ran in our Vol. I, No. 1, and again in Vol. IV, No. 1) — the complete text of an editorial first published in California Medicine, *the official journal of the California Medical Association (Sept., 1970; Vol. 113, No. 3). It remains probably the single most-quoted document in the abortion/euthanasia debate. Certainly it has produced more queries, and requests for copies, than anything else we know of. Also, it remains as relevant today as when first published. Thus we reprint it here for the benefit of those readers who have not actually read the original, or who would like to do so again.]*

"The Traditional Ethic . . . . "

The traditional Western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life regardless of its stage or condition. This ethic has had the blessing of the Judeo-Christian heritage and has been the basis for most of our laws and much of our social policy. The reverence for each and every human life has also been a keystone of Western medicine and is the ethic which has caused physicians to try to preserve, protect, repair, prolong, and enhance every human life which comes under their surveillance. This traditional ethic is still clearly dominant, but there is much to suggest that it is being eroded at its core and may eventually even be abandoned. This of course will produce profound changes in Western medicine and in Western society.

There are certain new facts and social realities which are becoming recognized, are widely discussed in Western society and seem certain to undermine and transform this traditional ethic. They have come into being and into focus as the social by-products of unprecedented technologic progress and achievement. Of particular importance are, first, the demographic data of human population expansion which tends to proceed uncontrolled and at a geometric rate of progression; second, an ever growing ecological disparity between the numbers of people and the resources available to support these numbers in the manner to which they are or would like to become accustomed; and third, and perhaps most important, a quite new social emphasis on something which is beginning to be called the quality of life, a something which becomes possible for the first time in human history because of scientific and technologic development. These are now being seen by a growing segment of the public as realities which are within the power of humans to control and there is quite evidently an increasing determination to do this.

What is not yet so clearly perceived is that in order to bring this about hard choices will have to be made with respect to what is to be preserved and strengthened and what is not, and that this will of necessity violate and ultimately destroy the traditional Western ethic with all that this portends. It will become necessary and acceptable to place relative rather than absolute values on such things as human lives, the use of scarce resources and the various elements which are to make up the quality of life or of living which is to be sought. This is quite distinctly at variance with the Judeo-Christian ethic and carries serious philosophical, social, economic, and political implications for Western society and perhaps for world society.

The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status, abortion is becoming accepted by society as moral, right and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws, and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.

It seems safe to predict that the new demographic, ecological, and social realities and aspirations are so powerful that the new ethic of relative rather than of absolute and equal values will ultimately prevail as man exercises ever more certain and effective control over his numbers, and uses his always comparatively scarce resources to provide the nutrition, housing, economic support, education, and health care in such ways as to achieve his desired quality of life and living. The criteria upon which these relative values are to be based will depend considerably upon whatever concept of the quality of life or living is developed. This may be expected to reflect the extent that quality of life is considered to be a function of personal fulfillment; of individual responsibility for the common welfare, the preservation of the environment, the betterment of the

species; and of whether or not, or to what extent, these responsibilities are to be exercised on a compulsory or voluntary basis.

The part which medicine will play as all this develops is not yet entirely clear. That it will be deeply involved is certain. Medicine's role with respect to changing attitudes toward abortion may well be a prototype of what is to occur. Another precedent may be found in the part physicians have played in evaluating who is and who is not to be given costly long-term renal dialysis. Certainly this has required placing relative values on human lives and the impact of the physician to this decision process has been considerable. One may anticipate further development of these roles as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society, and further public and professional determinations of when and when not to use scarce resources.

Since the problems which the new demographic, ecologic and social realities pose are fundamentally biological and ecological in nature and pertain to the survival and well-being of human beings, the participation of physicians and of the medical profession will be essential in planning and decision-making at many levels. No other discipline has the knowledge of human nature, human behavior, health and disease, and of what is involved in physical and mental well-being which will be needed. It is not too early for our profession to examine this new ethic, recognize it for what it is, and will mean for human society, and prepare to apply it in a rational development for the fulfillment and betterment of mankind in what is almost certain to be a biologically-oriented world society.

APPENDIX D

[*What follows is the complete text of the* Report on Criminal Abortions, *as originally printed in the Transactions of the American Medical Association (Vol. XII, pps. 75-8) in 1859. We have reproduced the emphases, punctuation, and other diacritical markings in the original.*]

Report on Criminal Abortion

The Committee appointed in May, 1857, to investigate the subject of CRIMINAL ABORTION, *with a view to its general suppression*, have attended to the duty assigned them, and would present the following report:—

The heinous guilt of criminal abortion, however viewed by the community, is everywhere acknowledged by medical men.

Its frequency—among all classes of society, rich and poor, single and married—most physicians have been led to suspect; very many, from their own experience of its deplorable results, have known. Were any doubt, however, entertained upon this point, it is at once removed by comparisons of the present with our past rates of increase in population, the size of our families, the statistics of our foetal deaths, by themselves considered, and relatively to the births and to the general mortality. The evidence from these sources is too constant and too overwhelming to be explained on the ground that pregnancies are merely prevented; or on any other supposition than that of fearfully extended crime.

The causes of this general demoralization are manifold. There are three of them, however, and they are the most important, with which the medical profession have especially to do.

The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life; not that its respectable members are ever knowingly and intentionally accessory to the unjustifiable commission of abortion, but that they are thought at times to omit precautions or measures that might prevent the occurrence of so unfortunate an event.

The third reason of the frightful extent of this crime is found in the

grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.

Abundant proof upon each of these points has been prepared by the Committee, and is elsewhere being published to the profession: but as the statements now made are almost axiomatic, such recapitulation would be here wearisome and is unnecessary.

Our duty is plain. If, by any act, we can effect aught towards the suppression of this crime, it must be done. In questions of abstract right, the medical profession do not acknowledge such words as expediency, time service, cowardice. We are the physical guardians of women; we, alone, thus far, of their offspring in utero. The case is here of life or death—the life or death of thousands—and it depends, almost wholly, upon ourselves.

As a profession we are unanimous in our condemnation of the crime. Mere resolutions to this effect, and nothing more, are therefore useless, evasive, cruel.

If to want of knowledge on a medical point, the slaughter of countless children now steadily perpetrated in our midst, is to be attributed, it is our duty, as physicians, and as good and true men, both publicly and privately, and by every means in our power, to enlighten this ignorance.

If we have ever been thought negligent of the sanctity of foetal life, the means of correcting the error are before us. If we have ever been so in deed, there are materials, and there is good occasion for the establishment of an obstetric code; which, rigorously kept to the standard of our attainments in knowledge, and generally accepted by the profession, would tend to prevent such unnecessary and unjustifiable destruction of human life.

If the tenets of the law, here unscientific, unjust, inhuman, can be bettered—as citizens, and to the best of our ability we should seek this end. If the evidence upon this point is especially of a medical character, it is our duty to proffer our aid, and in so important a matter to urge it. But if, as is also true, these great, fundamental, and fatal faults of the law are owing to doctrinal errors of the profession in a former age, it devolves upon us, by every bond we hold sacred, by our reverence for the fathers in medicine, by our love for our race, and by our responsibility as

accountable beings, to see these errors removed and their grievous results abated.

In accordance, therefore, with the facts in the case, the Committee would advise that this body, representing, as it does, the physicians of the land, publicly express its abhorrence of the unnatural and now rapidly increasing crime of abortion; that it avow its true nature, as no simple offence against public morality and decency, no mere misdemeanor, no attempt upon the life of the mother, but the wanton and murderous destruction of her child; and that while it would in no wise transcend its legitimate province or invade the precincts of the law, the Association recommend, by memorial, to the governors and legislatures of the several States, and, as representing the federal district, to the President and Congress, a careful examination and revision of the statutory and of so much of the common law, as relates to this crime. For we hold it to be "a thing deserving all hate and detestation, that a man in his very originall, whiles he is framed, whiles he is enlived, should be put to death under the very hands, and in the shop, of Nature."

In the belief that we have expressed the unanimous opinion of the Association, our report is respectfully submitted.

HORATIO R. STORER, *of Massachusetts.*
THOMAS W. BLATCHFORD, *of New York.*
HUGH L. HODGE, *of Pennsylvania.*
EDWARD H. BARTON, *of South Carolina.*
A. LOPEZ, *of Alabama.*
CHARLES A. POPE, *of Missouri.*
WM. HENRY BRISBANE, *of Wisconsin.*
A. J. SEMMES, *of District of Columbia.*

If the recommendations of the report are adopted, the Committee would offer the following resolutions:—

Resolved, That while physicians have long been united in condemning the act of producing abortion, at every period of gestation, except as necessary for preserving the life of either mother or child, it has become the duty of this Association, in view of the prevalence and increasing frequency of the crime, publicly to enter an earnest and solemn protest against such warrantable destruction of human life.

Resolved, That in pursuance of the grand and noble calling we profess, the saving of human lives, and of the sacred responsibilities thereby devolving upon us, the Association present this subject to the attention of the several legislative assemblies of the Union, with the prayer that the laws by which the crime of procuring abortion is attempted to be controlled may be revised, and that such other action may be taken in the premises as they in their wisdom may deem necessary.

Resolved, That the Association request the zealous co-operation of the various State Medical Societies in pressing this subject upon the legislatures of their respective States; and that the President and Secretaries of the Association are hereby authorized to carry out, by memorial, these resolutions.

The resolutions appended to the above report were unanimously adopted by the Association.

APPENDIX E

[*What follows is the final section of the article "Secular Infallibility," by Frank Zepezauer, which appeared in the December 11, 1981, issue of* National Review. *The first section points out that while Americans seemingly accept "infallibility" from judges — even baseball umpires — and so on, they reject* formal *claims (e.g,. by a pope), which strain "tolerance," etc. But not, evidently, on abortion. The author is chairman of the Department of English at Menlo-Atherton High School in Atherton, California; he has contributed articles to a number of American journals. His article is reprinted here with permission (©1981, National Review, Inc., New York, New York).*]

Secular Infallibility

Frank Zepezauer

It is the monarchical image that distresses our democratic and modernist nerves, the image and the candor it provokes, for we really don't mind the idea or the application of infallibility as long as we don't use the word itself. The pope, however, strains our tolerance by asserting that in certain moments he *is* "infallible." He says it out loud, wearing a silly-looking, triple-decker crown in the midst of medieval pomp, says it again and again, to believing Catholics as well as to free-thinkers in Jordache jeans.

Yet these free souls have themselves created a secular individualism where infallibility has assumed a new, but still secret, form, as we see in the decision to abort a human fetus, my final example. According to present abortion law, the individual as decider enjoys ultimate power, for we do not require a potential mother to justify the assertion of her will by any rubric, law, custom, or principle. We would prefer sober deliberation; we urge it upon her, along with counsel and instruction; but she remains free to listen to us or go her own way, answerable to no one, not the father, nor the unborn child, nor her parents, nor the anguished opponents of her act. We venerate that freedom, and we give it primary value: for we don't insist that she decide according to good reasons, only that she determine her own wants, asserting her "right to choose." Many of us find in her choice a tranquilizing resolution of painful ethical tension. She decides. She speaks. We accept.

And by our acceptance of the arbitrary assertion of her will, we also resolve a crucial question: who is and who is not human. We claim the question remains open, beyond ultimate resolution, entangled in intransi-

gent religious opinion. The Supreme Court itself disclaims the power and wisdom to settle it. Yet, we actually resolve the question every moment of the day, a million times a year.

She Speaks. It Dies

Consider. Every pregnant woman must now decide her child's fate. Should she decide to keep it, we protect it and treat it, *from the moment of decision*, as a human being. A recent article, for example, tells how physicians can now help unborn babies. They can alter their nourishing amniotic fluid, inject medication directly into their veins, even operate on their internal organs. But the language of the article tells even more. We learn that in one case this awesome technology was activated because "religious convictions prevented an abortion." Thus informed by the mother's choice about the kind of being they were working with, the physicians began speaking of the fetus as a "little patient," an "unborn infant," a "baby," a "kid." The baby who was the object of the article had gotten sick, and medical science fussed over her problem and eventually cured her, and today the child goes to kindergarten.

But medical science would have remained inert, powerless to save her, had some other conviction governed the mother's choice. Had she chosen to abort, she would immediately have denied the humanity of her unborn child, and, *from the moment of decision*, declared it a non-being — a fertilized egg, a blob of protoplasm, a congeries of fetal matter, an intruder usurping the mother's life-support system — and medical science so informed would have just as efficiently destroyed it.

Thus to the supposedly unresolvable question, "Who can really say when human life begins?" we have an unassailable answer: "The mother says." According to the implications of a decision of the Supreme Court, every child born since January 1973, even those carried by mothers who opposed abortion, owes its humanness to the will of the individual who, at a critical moment of her own life, chose to let it live. We grant the exercise of that will final, irrevocable, and absolute authority. It is, in fact, infallible.

APPENDIX F

[*The following editorial appeared in* The Economist *of London (in the issue dated 3-9 October, 1981), and is reprinted here in full, with permission. (© The Economist Newspaper Ltd., London.)*]

Test-tube babies

The Moral Questions Scientists Cannot Duck

A growing number of babies will begin life in a test tube. They will owe their existence to a British medical team, Dr. Robert Edwards and Mr. Patrick Steptoe, who have made child-bearing possible for women with damaged fallopian tubes. The team has established some 40 pregnancies so far this year and, if all goes well, 15-20 test-tube babies will be born before 1981 is out. While thanks, and applause, are due, this is also a reminder that research into human embryos and genes is moving fast and that it raises the most fundamental ethical questions.

When used solely to permit the creation of babies, the new test-tube procedures should not provoke moral concern. One or more eggs are taken from the would-be mother, fertilized in the test tube (where the process of cell division is begun) and reimplanted in the mother's womb. Sadly, the majority of fertilized embryos fail to establish themselves in the womb, resulting in a high wastage rate for the embryos. But this is not unnatural. The human womb aborts a significant proportion of embryos and until this century mothers, even in advanced countries, were sensible to assume that some of their children would die in infancy.

What is worrying is a sentence tucked away at the end of a long report by Dr. Edwards in last week's Nature, the scientific magazine. He notes, without discussing the ethical fallout, that a by-product of making test-tube babies could be the production of "spare embryos" for research work. Eyebrows ought to shoot up to hairlines. The practice of using living human embryos for research could be condoned (if at all) only in the most exceptional circumstances, when a hugh benefit to human life was expected and when all other research approaches (with animals, for example) had been exhausted.

Research with human embryos is not a mere gleam in the eye of medical science. It has already been carried out. Dr. Landrum Shettles, working at a hospital in Vermont, claims to have produced human clones in a

test tube. These cloned embryos, deriving their genes entirely from the father, grew to a mulberry-like ball of cells, at which point the experiment was aborted. It should never have been conceived.

Scientists are sceptical about even the preliminary results Dr. Shettles has claimed and they nearly all agree that the birth of a cloned human being is still far from being a practical possibility. Needless worry on this has been provoked by a book, written by Mr. David Rorvik and published by Lippincott, that purports to describe how a self-made millionnaire actually had a clone of himself produced. The claim is unsubstantiated. In a suit brought by a British geneticist against the author and publisher, a federal court in Philadelphia has found that the book is "a fraud and a hoax." But the fact that human clones are a long way off does not absolve scientists from the duty of pondering the moral issues in advance.

Don't monkey with clones

Similar moral issues are raised by gene therapy, in which people with genetic defects might have defective genes replaced, using genetic-engineering techniques. An American scientist has recently been condemned by other scientists for doing just such an experiment (unsuccessfully) without permission. Gene therapy is another technique that is a long way off, though researchers have recently made one necessary breakthrough by inserting foreign genes into animals. In principle, the eventual prospect of gene therapy in humans should be welcomed — but only when the effectiveness and safety of the techniques can be established.

It is understandable that people everywhere should feel sensitive about any research that involves monkeying with human genes. Scientists should react with sensitivity to this concern. Intelligent debate should be begun between scientists and laymen, with the aim of establishing protocols. If this is not done, there is a high risk of an eventual unthinking legislative backlash against science and scientists.

APPENDIX G

[*The Rockford Institute is well-known for publishing significant materials on social and cultural affairs; among its publications is the newsletter* Persuasion at Work, *which is intended primarily for those in "business" — but in fact it is also read in the academic community and elsewhere. The August, 1981 issue carried a monograph by Allan C. Carlson, now executive vice president of the Institute, and a contributor to our own journal, among others. We believe that our readers will find it of particular interest, and reprint it here in full, with permission (© 1981, by The Rockford Institute, 934 N. Main St., Rockford, Illinois 61103).*]

Reflections On the Most Divisive Issue of Our Time

Allan C. Carlson

At first look, few public issues seem to hold less relevance for the business community than the abortion question. Except for matters such as health-plan coverage, economic or profit-oriented questions do not appear to be involved. Persons holding to either the "prolife" or "prochoice" positions seem able to work comfortably together so long as the issue remains submerged. The opposing forces in the increasingly polarized debate seem locked in a fruitless stalemate, with neither side able to fulfill its complete agenda. Reflecting this judgment, the *Wall Street Journal* editorialized last year that the resulting standoff — essentially allowing abortions on demand but not mandating their public funding — appropriately reflected both the ambiguity of the subject and the ambivalence of majority belief of the American people. From these perspectives, the business community would appear to have little to gain, and much to lose, through involvement in such a tangential and emotion-laden matter.

Yet more sustained inquiry suggests that the liberalization of abortion law over the past two decades was not an isolated event, but rather an aspect of deeper social and cultural developments; specifically, one expression of the cultural turmoil and moral nihilism which emerged during the late 1960's. The free-enterprise system was not then and cannot now be isolated from these broader contexts; indeed, it is vitally bound to them, for capitalism is no more than the economic dimension of a free and responsible society. Ultimately, as George Gilder's widely acclaimed book *Wealth and Poverty* reminds us, there are moral as well as economic dimensions to capitalism. Experience also suggests that the

effectiveness of the work force is directly dependent on the psychological incentives, stability and supportiveness of the family unit, qualities which the act of abortion directly affects. In sum, the business community can ill afford a posture of indifference toward human abortion, perhaps the most important and divisive moral issue of our time.

The Collapse of a Cultural Norm

The sweeping change in American attitudes toward abortion in the decade-and-a-half after 1960 stands as a textbook example of a society experiencing normative decomposition. Cultural norms are those historically conditioned, institutionalized restraints on choice which intervene in both obvious and subtle ways to influence individual decisions toward the well-being of society. Persons sit quietly and applaud politely at classical music concerts; for example, because such is the normative behavior expected of them. Baseball fans, reflecting a different set of norms, act in very different — yet easily catalogued — ways. At a more complex level, normative standards also guide choices affecting such intimate human acts as mating and reproduction. While never arbitrary, norms are usually invisible and seldom consciously understood. They represent the accumulated moral and social wisdom of centuries past, a legacy which defines a viable society.

Yet because of their invisible and assumed qualities, cultural norms are seldom supported by an established body of historical, scientific and statistical evidence. When broadly assaulted, they prove to be fragile creations.

The highly organized abortion-reform movement of the late 1960's, for example, marshaled a series of arguments for the liberalization of abortion that the confused and ill-defined defenders of the status quo were not prepared to meet. These pro-abortion groups estimated an annual level of from 300,000 to 1,000,000 criminal abortions and argued that since abortion occurred in spite of its illegality, it should for humanitarian reasons be made legal and risk free. In a related matter, abortion proponents argued that the legalization of abortion would significantly reduce the maternal mortality rate, for "back alley" abortions would no longer be necessary, while legal abortion would prove to be much safer than a pregnancy carried to term. Furthermore, they argued, abortion would help improve the psychological condition of unmarried pregnant women and others under pregnancy-caused stress, where forcing them to bear an unwanted baby could result in serious trauma.

Concerning the difficult moral questions surrounding abortion, reform advocates argued that physicians and scientists had no convincing and

uniform insights into when "human" life really began. In any respect, measures of humanness were theological, rather than scientific, questions. Given the undeveloped state of the embryo and early fetus, it was also unlikely that such tiny blobs of pre-human protoplasm could feel any pain. The argument that life began at conception, abortion reform advocates concluded, was rooted in a distinctly Roman Catholic theological perspective that should not be forced on other Americans. And, finally, they maintained that existing state antiabortion laws were really an aberration, reflecting the peculiar middle class, antiwoman biases of the 19th century. In pre-Victorian times, they asserted, relatively unhindered access to abortion was the common state of affairs and a necessary aspect of a fully free society.

In the face of these arguments, persons and organizations defending the existing antiabortion statutes fell back upon essentially moral and religious postures. Legal abortion on demand was an untested commodity, and arguments over its salutary effects could not be effectively countered. Science and medicine seemed to give contradictory answers to the question of when an individual life began. The trend among Protesant and Jewish faith groups was, indeed, towards a more liberal view of abortion.

The Shifting Balance of Evidence

During the years which have followed the Supreme Court's 1973 *Roe* v. *Wade* decision, however, the antiabortion movement — now challenging rather than defending the status quo — has grown vastly larger and increasingly sophisticated. Significantly, medical and social science research is also beginning to provide scientifically credible responses to the utilitarian arguments upon which the abortion-reform movement built its case. An important event in this respect was publication this year of *New Perspectives on Human Abortion*, edited by Thomas W. Hilgers, M.D., Dennis J. Horan and David Mall. This impressive, yet largely unheralded, volume of essays wholly realigns major elements of the abortion debate.

Concerning the incidence of illegal abortion, for example, one article outlines the first objective model for estimating the annual number of criminal abortions in the United States since 1940. Using a methodology actually weighted in favor of the pro-abortion arguments, the researchers involved discovered that most estimates of illegal abortions in the United States have been grossly exaggerated. Instead of the one-million-annually figure bantered about, a more credible estimate for the prelegalized era would be a mean of 98,000 per year. It also did not prove true that legal

abortion simply replaced criminal abortion. Rather, with legalized abortion, they discovered an exponential climb in the *total* number of annual abortions in the U.S.A, ranging from a 6- to 11-fold increase. As a result, for every criminal abortion eliminated, over eighteen legal abortions have been performed. Even so, criminal abortion has not disappeared in the United States, with approximately 20,000 occurring annually. Relative to the goal of eliminating criminal abortion, these researchers conclude that legalized abortion has failed.[1]

A statistical assessment of abortion-related maternal deaths, using data compiled by the National Center for Health Statistics and the Abortion Surveillance Branch of the Center for Disease Control, produced a number of equally unexpected results. The introduction of abortion on demand, for example, had *no effect* on the already existing downward trend in the maternal mortality rate. Similarly, the largest number of maternal deaths related to criminal abortion during the 25 years prior to legalization was 388, reached in 1948. This suggests that estimates by abortion-reform advocates of up to 10,000 annual abortion-related deaths prior to legalization have been grossly exaggerated. Furthermore, while maternal deaths stemming from criminal abortion do appear to be decreasing, they have been replaced — almost one for one — by deaths due to legal abortion (drawn, it is true, from a much larger pool of women having abortions). Finally, when using modern data employing for the first time compatible statistical measures, the evidence is clear that natural pregnancy is safer for women than legal abortion, during both the first and second 20 weeks of pregnancy.[2]

On the basis of the legal abortion experience, other medical researchers report that termination of a first pregnancy causes "a statistically significant increase in complications of subsequent pregnancies and labors,"[3] while the abortion procedure in general has led to "diverse and sometimes life-threatening urologic complications" such as urinary-tract infections, peritonitis, and — in extreme cases — renal failure. "Some of the most catastrophic complications have occurred in teenage girls," notes physician Richard Watson. "As the majority of these abortions are done for social reasons, these serious complications and deaths are especially tragic."[4] Legal abortion, contrary to the arguments of its proponents, is neither safe nor risk free.

Myre Sim, Director of the Forensic Psychiatry Clinic in Victoria, B.C., has also exploded most of the myths surrounding the psychology of pregnancy, birth and abortion. He dissects the incredibly distorted research behind previous investigations of these questions and presents

unambiguous data indicating the relatively high degree of delayed trauma caused by abortion when compared to childbirth "(A)cross the board," he states, "the prognosis of a post-abortive psychosis is worse than that of a post-partum one." He concludes that if society does not push abortion at women, most will go to term satisfactorily without long-term psychological complications.[5]

Science is also beginning to answer basic questions — deemed unanswerable by the U.S. Supreme Court — concerning the origin of individual human life. Until recent decades, the so-called biogenetic law developed by Ernst Haeckel in 1866 dominated the science of human development. Its echoes could be heard in Justice Blackmun's majority opinion for the Court. Haeckel theorized that the human embryo repeated in its growth the entire process of evolution — from a primitive single cell through an amphibianlike stage to a complex multicellular creature — in abbreviated manner. Hence, according to this interpretation, the emergence of distinctly human form occurred relatively late in the development process.

Over the past few decades, however, the work of modern geneticists and human embryologists has overturned Haeckel's thesis and offered concrete insights into the emergence of distinct human consciousness. E. Blechschmidt, Director of the Institute of Anatomy at West Germany's University of Gottingen, terms it a "fundamental law" of modern developmental science "that not only human specificity but also the individual specificity of each human being remains preserved from fertilization to death." From the time of conception, he continues, the human embryo behaves in observably "human," as opposed to "animal," ways. Particularly characteristic is the formation of the brain, which precedes all other organ formations. By the beginning of the fourth week, the young embryo is only 3 mm. in size but sports a beating heart, functioning brain, spinal cord, stomach, intestines and liver. During the second month, the embryo's tiny face is sensitive to touch; at seven weeks, there is evidence to suggest that these minute beings are already playing with their fingers, kicking and gripping. By the end of the second month, almost all organs known to the adult human are found and, in one sense or another, functioning. Sonographs have shown a 12-week-old fetus swimming through the amniotic fluid in an apparent effort to move out of range of detection.[6]

There is also medical evidence to suggest that the fetus is pain-sensitive as early as its eighth week and that common abortion methods such as suction currettage (which tears apart and sucks up the unborn child in

pieces, with dismemberment usually lasting ten minutes) and the injection of hypertonic saline solution (which attacks the fetus's skin much as an acid, with the fetal heart finally stopping after two hours) cause intense pain. "However inarticulate," John Noonan adds concerning fetuses experiencing abortion, "however slight their cognitive powers, however rudimentary their sensations, they are sentient creatures undergoing the disintegration of their being and the termination of their vital capabilities. That experience is painful in itself."[7] In a telling commentary on contemporary American moral judgments, the newborn kitten in several states holds far greater claim to legal protection against pain than the unborn human child at any stage of development.

Other arguments advanced by the abortion-reform movement have proven equally specious. The antiabortion position is not, and has never been, exclusively or even overwhelmingly "Roman Catholic." Protestants and Jews are indeed more formally divided on the subject, but members of non-Catholic groups ranging from the Lutheran Church-Missouri Synod to the Southern Baptist Convention to Orthodox Judaism to Islam hold strong antiabortion positions or expressions of majority belief.[8] Similarly, the American antiabortion statutes of the mid-19th century were not a new phenomenon, but rather the adaptation of much older antiabortion restrictions (applicable to midwives) to medical doctors, who were then just beginning to assume a role in the care and delivery of expectant mothers.[9]

Business' Concern: The Family as Victim of Abortion

The weight of scientific and medical evidence, it seems fair to conclude, is shifting against the proabortion or "prochoice" argument. Legal abortion has not proven to be the medical panacea which was promised. It has not eliminated criminal abortion, reduced maternal mortality, improved the psychological condition of the average pregnant woman, or proven safe and risk free. Legal abortion has by implication dehumanized the fetus at the very time that science was proving its humanity. Surveying the social-science research mustered in support of "pro-choice" arguments, one is also struck by the degree of methodological, scientific and logical distortion employed to give credence to otherwise hollow assertions.

Ultimately, however, the crux of the abortion controversy is over more fundamental questions relating to human sexuality and family life. And it is in this direction that the debate is ineluctably moving. The abortion-reform movement of the late 1960's, it is now clear, was part of a broader effort to overturn the restraints imposed by Western culture on the sex-

ual impulse. Amidst the continuing harangues of the sexual libertarians, it is important to remember that the traditional normative limitation of sexual intercourse to marriage was not motivated by misanthropic disgust towards human pleasure but rather by a socially conditioned desire to insure that if pregnancy resulted, those responsible for creating the child would be able to care for it. The statistically confirmed surge in premarital sex and extramarital pregnancies after 1960 were — and remain — the root sources of the demand for unfettered abortion. When inherited social controls failed, medical termination became the bitter modern alternative.

Alongside those millions so terminated, the modern family structure stands as the principal victim of the abortion revolution. Bearing children is the most morally charged thing that a man and a woman can do. A community's encouragement of children, moreover, is a sign of confidence in its sustaining traditions, its continuing relevance and its future.[10]

Human abortion cuts violently through such values. It represents the repudiation of a child by its parents. Rather than a condition necessary to free women from male oppression, as the feminists have charged, abortion seems instead to be a coercive method commonly used by men to free themselves from familial responsibility to women. From a social perspective, moreover, abortion represents more than the ending of a life. "(W)hen institutionalized and regarded as morally acceptable or at least morally indifferent by society," ethicist Stanley Hauerwas states, "abortion indicates a society is afraid of itself and for its children."[11] Legal abortion on the scale presently found in the Western World symbolizes a cultural crisis of the deepest order. Capitalism, psychologically grounded in an optimistic vision of the future and socially rooted in the ethos of the bourgeois family, has a vital stake in its resolution.

We must acknowledge, however, that when a society's accepted standards of conduct disintegrate, there are no easy ways to restore or recreate them. The legally destroyed lives of over 10 million unborn children during the past decade are part of our collective consciousness. We stand with Pilate, unable to wash our responsibility away.

For this reason, the passage of legislation or a constitutional amendment that would recriminalize most or all abortions cannot, by itself, restore moral order to this country. Unless such a political achievement is part of a vastly broader cultural reorientation — dare one say rebirth — it would only result in deepened bitter division and predictably ineffective enforcement.

The recent blending of the "prolife" and "profamily" movements, on

the other hand, offers a measure of hope. For it is only within such a broader context that normative guides for family life and sexuality might be preserved and, over time, spread to an ever-widening proportion of the community.

Business need not be an idle spectator in this regenerative process. Personnel policies can be shaped, within the limits of law, to support married employees, especially those with or expecting children. In numerous ways, particularly through example, management can communicate the message that all "lifestyles" are not equal; that there are clearly distinguished "responsible" and "irresponsible" ways of ordering one's life. Indeed, the business community can again assume its necessary historical role as a buttress to a progressive, humane and family-oriented society, where the scourge and tragedy of human abortion can be effectively reduced.

NOTES

1. Barbara J. Syska, Thomas W. Hilgers, M.D., and Dennis O'Hare, "An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy," Hilgers, Horan and Mall, editors, *New Perspectives on Human Abortion* (Frederick, MD: University Publications of America, 1981), pp. 164-81.
2. Thomas W. Hilgers, M.D. and Dennis O'Hare, "Abortion Related Maternal Mortality: An In-Depth Analysis," *op. cit.*, pp. 69-91.
3. Stanislaw Z. Lembrych, M.D., "Fertility Problems Following Aborted First Pregnancy," *op. cit.*, p. 132.
4. Richard A. Watson, M.D. "Urologic Complications of Legal Abortion," *op. cit.*, pp. 135-44.
5. Myre Sim, M.D., "Abortion and Psychiatry," *op. cit.*, pp. 151-63.
6. Mark I. Muilenburg and Allan D. Dvorak, M.D., "Human Characteristics of the Early Fetus: A Sonographic Demonstration," *op. cit.*, pp. 1-5.
7. John T. Noonan, Jr., "The Experience of Pain by the Unborn," *op. cit.*, pp. 205-14.
8. J. Robert Nelson, "The Divided Mind of Protestant Christians," *op. cit.*, pp. 387-404; J. David Bleich, "Abortion and Jewish Law," *op. cit.*, pp. 405-19.
9. Dennis J. Horan and Thomas J. Marzen, "Abortion and Midwifery: A Footnote in Legal History," *op. cit.*, pp. 199-204.
10. See *The Family: America's Hope* (Rockford, IL: Rockford College Institute, 1979), p. 14.
11. Stanley Hauerwas, "Abortion: Once Again," *New Perspectives on Human Abortion*, p. 433.

APPENDIX H

[*The following article by J. Robert Nelson first appeared in* The Christian Century *magazine, of which the author is an editor-at-large; he is also professor of theology at Boston University (where he was Dean of the School of Theology), and has written eleven books as well as numerous articles. We reprint his article here in full, (©1981, Christian Century Foundation; reprinted by permission from the August 12-19, 1981 issue of* The Christian Century.)]

Stepping Out of Down's Syndrome

One of the lapidary commandments which Moses brought down from Mount Sinai was the prohibition of killing. We still question it.

Killing what?

Human beings, presumably.

In all cases?

Well, certainly not with murderous intent.

You mean, the violation depends upon the intention?

Usually, yes. But there are some circumstances . . .

Like unborn babies?

That's right; especially in such cases.

There is a Mount Sinai in New York City, too. It is a famous hospital and school of medicine. Here, two physicians and a pregnant woman demonstrated their understanding that the Sinaitic Law does not apply to the killing of nascent life. Their view is shared by millions and vigorously opposed by other millions, most of whom invoke divine sanction for their beliefs. So unqualified approval of the doctors' deed is as difficult to justify as absolute condemnation.

Their widely reported action was to induce an exceptional kind of abortion for a woman in a rare condition of advanced pregnancy. When her uterus was examined by amniocentesis last year, it was determined by a usually accurate test that one of the 20-week-old twins within her body was affected by Down's syndrome. This fairly common chromosomal imbalance is known vulgarly as "Mongolism," an intentionally pejorative term long used by Caucasians because of the characteristic facial features caused by this genetic affliction. Mental retardation and physical disability accompany the condition, but in widely varying degrees of intensity.

The choice of what to do about the twins seemed clear at first: either bring them both to birth or abort both. It was reported that the woman preferred the latter alternative — to sacrifice the life of the healthy one rather than having to raise and care for a Down's child. Then a third

choice, unprecedented in the United States, was proposed: namely, kill the Down's twin and bring the other to term.

The two doctors, Usha Chitkara and Thomas D. Kerenyi, knew that this delicate procedure had been employed in Sweden by piercing the heart and drawing the blood of one without hurting the other. They also knew the risks. The legal risk to themselves was cleared by consulting the New York Supreme Court. The risk to the woman was clinically assessed. But the risk to the healthy twin was discounted, however grave it might be, since the woman was within her legal rights to decide for abortion of both.

It must have been a mere coincidence that Dr. Kerenyi, speaking for Mount Sinai at a news conference, referred to the Bible while describing the appearance of the destroyed twin. When it was discharged from the woman along with the healthy, would-have-been brother, it was "flat, fragile and paperlike," he said, "like a rose that had been pressed in the Bible for five years."

We were at the Ecumenical Institute, Château de Bossey, near Geneva, Switzerland, in June. We were nearly 50 people, medical personnel and others, from six continents. It was a consultation on "Death and Life in Different Cultures," convened by the Christian Medical Commission of the World Council of Churches.

Right in the middle of one of those inevitable discussions of abortion practices and ethics, someone brought in the day's newspaper with the story from Mount Sinai. This would have provoked in any case an inconclusive argument, potentially emotional, and probably productive of no new light of moral reasoning. In the Bossey situation, however, the report on the doomed Down's baby carried a particular poignancy because of a remarkable film we had seen the previous evening.

When measured by every critical criterion, this film is superb. Titled *Stepping Out*, it was produced in Australia by Chris Noonan. At the film festival in Milan recently it won the grand prize for movies related to the International Year of Disabled Persons. It is a true story, filmed in *vérité*; but it is not just a documentary. Let us say that it is the most persuasive affirmation imaginable of the humanness of persons afflicted by Down's syndrome.

In Sydney there is an institution for persons with this disability. They call it "intellectual disability," which is no euphemism. The community consists of adolescent and mature men and women as well as children. To this place came a man from Chile: an expert teacher of yoga, music, rhythm, drama and dance. With an extraordinary degree of patience, tact

and persistence, this man showed the young women and men what they otherwise would never have known they could do. They could use color and costume with delightful aesthetic effect. By pantomime and dance they could convey emotions and tell stories of human distress, longing and hope.

After some weeks of his presence in the community, rehearsing the people with sober and respectful care, the man realized that they were capable of presenting something far better than an institutional fun-night show. Agreements were made with the glorious new Sydney Opera House. Professional costumes were purchased. Tickets were sold to fill the house. And all the while the cameramen achieved outstanding shots of the performers in make-up and dress rehearsal. The great night arrived. The film shows masterful close-ups of the faces of those awaiting their cues. Intellectually disabled, to be sure; but they acted as amateur actors always act before their performance. And when they appeared on stage, their presentation was not that of lovable-pitiable "Mongols" who had been taught, like walking dogs, to do entertaining tricks. They presented human art in musical motion and gesture, personal feelings and understanding in facial expression and rather squinting eyes.

The climax of the evening's program was a young man's portrayal through ballet of the anguish and suicide of Cho-cho-san, after Lieutenant Pinkerton of Puccini's *Madama Butterfly* abandoned her (his Japanese wife) and their child. The roaring ovation given by the standing audience was miles away from mere patronizing applause for well-meaning effort. It was an ovation of such spontaneity and sincerity as might have been accorded Australia's Joan Sutherland on the same stage.

There are times in the ongoing, intensifying debate over "Who shall live?" when the familiar arguments lose their sting. A woman's right? Unwanted pregnancy? Quality of life? Insupportable burden? Needless suffering? Sanctity of life? God's gift? By now we know them all: pro and con and in between. In our ecumenical group it was noted that Europeans, British and North Americans are more and more adopting the idea that genetically abnormal babies ought not be allowed to be born. Much of the guesswork has now been removed. Obstetrical technology with laboratory testing can deal with about 300 of the 3,000 known kinds of genetic disability. So why not, with good reason, save parents, families, institutions and society the trouble and expense? And why not, with a sense of mercy, spare these disabled boys and girls the unhappy and meaningless lives that must await them?

Unhappy? Meaningless? In many cases, so it seems. But we who have seen *Stepping Out* will not soon forget the expression of joyous fulfillment on the face of that male Cho-cho-san, robed in silken splendor, holding aloft the hara-kiri sword, and returning a look of triumph to the audience which clapped and cheered in approval.

— J. ROBERT NELSON

IMPORTANT NOTICE

THE HUMAN LIFE REVIEW accepts regular subscriptions at the rate of $12 for a full year (four issues). Canadian subscribers please add $2 (U.S. Currency). All other foreign please add $4 (U.S.). Please address all subscription orders to the address below and enclose payment with order. You may enter gift subscriptions for friends, libraries, or schools at $12 each.

How to order previous issues:

This issue — No. 1 of Volume 8 — is the 29th issue published to date. You may order single copies of this issue — or the 28 previous issues — by sending $3 per issue to the address below. Simply designate copies desired by asking for any issue(s) by number: #1-4 (1975), #5-8, (1976), #9-12 (1977), #13-16 (1978), #17-20 (1979), #21-24 (1980), #25-28 (1981). You pay only the copy price ($3); we pay all postage and handling.

Bound Volumes: we now have available Bound Volumes (in permanent, library-style hard-cover editions, with gold lettering, etc.) of the first seven years (1975-1981) of this review. *All volumes are completely indexed*, and are available postpaid at $30 per volume, or all seven volumes for $175. Separate copies of each index are also available at $.60 per copy.

Bulk Orders: while supply of back issues lasts, we will supply 10 or more copies of any issue at $2 each; 100 or more copies at $1 each. Please indicate quantities per issue desired and include payment in full with order.

Address all orders to:

The Human Life Foundation, Inc.
150 East 35th Street
New York, New York 10016

Special Notice

An Even Dozen, by Ellen Wilson, has just been published by *The Human Life Press*. It is a collection of Miss Wilson's essays (all of which first appeared in the Review), and is now available at $10 per copy direct from the Foundation.


THE HUMAN LIFE
FOUNDATION INC.